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No. _____

In The
Supreme Court of the United States

J.R. Ridgely Wyvill,
Petitioner,

v.

United Companies Life Insurance Company;
United Companies Financial Corporation;
United Companies Lending Corporation,
Respondents.

Gerald Waldrop,
Petitioner,

v.

United Companies Financial Corporation;
United Companies Mortgage of Georgia;
United Companies Lending Corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit erred in the instant case by refusing to follow and apply the correct standard of appellate review established by the controlling legal authority of this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 2000 WL 743663, 120 S.Ct. 2097 (2000), particularly in light of the fact that Petitioners in the instant case presented significantly more credible and substantial evidence of Respondents' acts of employment discrimination than did the Petitioner in *Reeves*?

2. Whether under the controlling legal authority of this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 2000 WL 743663, 120 S.Ct. 2097 (2000), the United States Court of Appeals for the Fifth Circuit erred in substituting its opinion for the opinions of the jury and district court in deciding that Petitioners' substantial and credible *prima facie* proof of age discrimination, coupled with Petitioners' substantial and credible evidence rebutting Respondents' proffered explanations for firing Petitioners, was insufficient to sustain the jury's verdict and the district court's judgment in favor of Petitioners?

3. Whether under the controlling legal authority of this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 2000 WL 743663, 120 S.Ct. 2097 (2000), the United States Court of Appeals for the Fifth Circuit erred in the instant case by substituting its opinions for the opinions of the jury and thus usurped the jury's functions of making credibility determinations about witnesses, weighing the evidence and drawing legitimate inferences from the facts established by Petitioners in support of their age discrimination claims against Respondents?

4. Whether under the controlling legal authority of this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 2000 WL 743663, 120 S.Ct. 2097 (2000), the United States Court of Appeals for the Fifth Circuit erred by reviewing Petitioners' evidence on a piecemeal basis, rather than reviewing the trial court record as a whole, and further erred by failing to disregard all evidence favorable to the moving parties that the jury was not required to believe?

PARTIES TO THE PROCEEDINGS

The following is a list of parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

Petitioners

J. R. Ridgely Wyvill; Petitioner Wyvill is an individual and has no corporate affiliations.

Gerald Waldrop; Petitioner Waldrop is an individual and has no corporate affiliations.

Respondents

United Companies Life Insurance Company, United Companies Financial Corporation, United Companies Mortgage of Georgia, United Companies Lending Corporation.

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I. This Court should grant Certiorari or, in the alternative, reverse and vacate the decision by the Court of Appeals for the Fifth Circuit in the instant case because in this case and in subsequent employment discrimination cases the Fifth Circuit has steadfastly refused to follow and apply the correct standard of appellate review established by the controlling legal authority of this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 2000 WL 743663, 120 S.Ct. 2097 (2000).

II. This Court should grant Certiorari because, as demonstrated by the post-*Reeves* decisions in *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. July 5, 2000) and *Rubinstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392 (5th Cir. July 6, 2000), the United States Court of Appeals for the Fifth Circuit clearly exhibits its continuing unwillingness to follow and apply the correct standard of appellate review in employment discrimination cases as required by the controlling legal authority of this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 2000 WL 743663, 120 S.Ct. 2097 (2000).

III. This Court should grant Certiorari or, in the alternative, reverse and vacate the decision of the Court of Appeals for the Fifth Circuit in the instant case because the Fifth Circuit usurped the jury's functions of making credibility determinations about witnesses, weighing the evidence and drawing legitimate inferences from the facts established by Petitioners in support of their age discrimination claims against Respondents, all of which actions by the Fifth Circuit violate and ignore the controlling legal authority of this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 2000 WL 743663, 120 S.Ct. 2097 (2000).

IV. This Court should grant Certiorari because to do otherwise further subjects those citizens of the States of Louisiana, Texas and Mississippi, who are wrongfully discriminated against by their employers, to the denial by the Court of Appeals for the Fifth Circuit of their federally guaranteed rights and remedies.

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The Opinion of the United States Court of Appeals for the Fifth Circuit is unreported and attached as Appendix A at 2a. The Order of the District Court denying Respondents' motion for judgment as a matter of law is unreported and attached as Appendix B at 22a. The Order of the Fifth Circuit panel denying Petitioners' petition for rehearing en banc is unreported and attached as Appendix B at 40a.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on May 31, 2000, and the denial of the Petition for Rehearing En Banc entered on August 21, 2000, by a Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute construed is the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.S. § 623(a) which says: "It shall be unlawful for an employer -- (1) . . . to discharge any individual or otherwise discriminate against any individual ... because of such individual's age. . ."

The procedural rule construed is Fed. R. Civ. P. 50 which provides, in pertinent part:

> (a) Judgment as a Matter of Law.
>
> (1) If during a trial by Jury a party has been fully heard on an issue and there is

> no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue . . .
>
> (b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment–and may alternatively request a new trial or join a motion for a new trial under Rule 59. . . .

STATEMENT OF THE CASE

A jury in the United States District Court for the Middle District of Louisiana found that Petitioners, Gerald Waldrop and Ridgely Wyvill, were fired by Respondents because of their age. During the trial, the district court denied Respondents' motion for a directed verdict and submitted the case to the jury. The jury found that Respondents willfully violated the ADEA in firing Petitioners and awarded Waldrop $76,569 and Wyvill $186,939 in

compensatory damages. The district court awarded statutory liquidated damages to Waldrop and Wyvill, and an additional $20,000 in front pay to Wyvill. Post-trial, the district court denied Respondents' renewed motion for a directed verdict. The United States Court of Appeals for the Fifth Circuit vacated the district court's judgment and remanded the case for entry of judgment as a matter of law in favor of Respondents. Repeating the error of its decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 197 F.3d 688 (5th Cir. 2000), the Fifth Circuit held that Respondents were entitled to judgment as a matter of law under Fed. R. Civ. P. 50, holding that Petitioners failed to produce evidence sufficient to satisfy the Fifth Circuit's "pretext plus" standard for submitting an age discrimination case to the jury.

FACTS

Petitioner J. R. Ridgely Wyvill worked for Respondent United Companies Life Insurance Company ("Life Company"), a subsidiary of Respondent United Companies Financial Corporation ("United Companies"), in Baton Rouge, Louisiana, for 18 years before he was fired in 1993. At the time of his firing, Wyvill was 53 years old and manager of the credit life department. App. F at 139a, 162a-163a.

Petitioner Gerald Waldrop worked in Dalton, Georgia as a branch manager for Respondent United Companies Lending Corporation ("Lending Company"), a subsidiary of United Companies, for 10 years before he was fired in 1993. Waldrop was 47 years old when he was fired. App. F at 91a.

On April 22, 1994, Wyvill filed suit in the United States District Court for the Middle District of Louisiana

against Respondents United Companies Life Insurance Company, United Companies Financial Corporation and United Companies Lending Corporation. On June 29, 1994, Waldrop filed suit in the United States District Court for the Middle District of Louisiana against Respondents United Companies Financial Corporation, United Companies Mortgage of Georgia and United Companies Lending Corporation. Petitioners claimed that Respondents fired them because of their respective ages, in violation of the Age Discrimination in Employment Act.

Petitioners proved they were in the protected age group at the time they were fired. Petitioners also proved that they were replaced by persons under 40 years of age. App. F 91a, 140a-146a. Wyvill proved that his assistant, 33-year-old Margaret Moon, assumed his job duties after he was fired. App F. at 91a-92a, 139a-149a, 186-188a. Waldrop proved that his assistant, Ms. Sandy Stafford, who was under 40 years old, replaced him as branch manager.

Petitioners also proved they were exemplary employees who had performed their jobs well for Respondents. Waldrop received excellent performance reviews, a bonus each year and a pay raise every year except 1991. App. F. at 92a, 100a, 110a-112a, 121a-126a. During Waldrop's 10 years of employment, Respondents' branch offices grew in number from about 60 to approximately 140. Waldrop's branch was profitable from the day he opened it to the day he was fired, and it was consistently among the top five to ten most profitable of Respondents' branches during Waldrop's employment. App. F. at 92a-95a. At most every meeting of the branch managers, Respondents' Chief Executive Officer, Terrell Brown, praised Waldrop as the model of a superior branch manager F at 96a-100a.

Respondents sent new hires to Waldrop for training as branch managers. *Id.*

Petitioner Wyvill received a raise each year he was with Respondent Life Company and always received good annual performance evaluations. He had successfully managed, and was continuing to successfully manage, Respondent's credit life department when he was fired. App F. at 141a-143a.

RESPONDENTS' PROFFERED EXPLANATIONS FOR FIRING PETITIONERS

Respondents claim that Waldrop was fired because of abusive behavior he exhibited toward some of his employees and customers. Respondents claim that Wyvill was fired because he made unauthorized and disruptive phone calls to two co-employees, Carl Scott and Sandy Stafford.

PETITIONERS' REBUTTAL EVIDENCE ESTABLISHING THE PRETEXT OF RESPONDENTS' PROFFERED EXPLANATIONS FOR FIRING PETITIONERS

Petitioners offered extensive evidence rebutting Respondents' proffered explanations for firing them, evidence which the jury and district court found credible and substantial. Waldrop testified that he did not abuse his employees. App F. 113a-116a. Although two of Waldrop's employees, Sandy Stafford and Pam McMillan, testified that they told Waldrop's supervisor, D. C. Brantley, that Waldrop had been abusive toward them App. F. at 198a-200a, Brantley testified that he had a good relationship with Stafford and McMillan, and that neither Stafford, McMillan nor any other of Waldrop's employees ever told him that

Waldrop had been abusive. App. F. at 200a-201a, 206a-208a. As supervisor, Brantley prepared evaluations of Waldrop's job performance from March, 1988 until shortly before Waldrop was fired in 1993. *Id.* At no time did Brantley write any comments about Waldrop being abusive to any of his employees. App. F. at 113a-116a, 200a-208a. Brantley also testified that, prior to attending the meeting where Waldrop was fired, not only had he never heard any allegations of abusive treatment by Waldrop, he had no idea that Respondents were going to use the purported "abusive treatment" claims of Stafford and McMillan as a reason for firing Waldrop. *Id.*

Although Stafford and McMillan said that Waldrop had been abusive toward them and that they were "deathly afraid" of him, they also testified about visiting Waldrop at his home and office after Respondents fired him. McMillan stated that she went to his new business office to show him her baby granddaughter. App. F at 204a-205a. Stafford admitted visiting Waldrop at his home and his new office. She was alone on both of those visits. During the visit to Waldrop's home, Stafford discussed her concerns about accepting Respondents' offer of branch manager at Waldrop's former branch in Dalton, Georgia. App F. at 194a-195a.

Waldrop proved that he had, in fact, treated his employees very well. He allowed one of his employees, Cheryl Welch, whom he had hired on two separate occasions, to restructure her hours so she could spend more time with her children. App. F. at 195a-196a. Stafford testified Waldrop was fair to her in his evaluations of her job performance. *Id.* Waldrop gave Stafford numerous raises and arranged for Respondents to provide her a car. Waldrop shared substantial amounts of his performance bonuses with his employees. App. F at 195a.

Respondents and the Fifth Circuit made much of the leave of absence Waldrop took approximately one and one-half years before he was fired. Respondents claimed they compelled Waldrop's leave of absence as discipline for his purported abusive conduct. Waldrop proved, however, that Respondents lied about this matter. Waldrop introduced a 1991 letter from his doctor advising that he needed a leave of absence, as well as a letter from United Companies' vice president, Joe Phillips, to United Companies' president, to Roger Clark, recommending that Waldrop be allowed to take a 30-day leave of absence. Phillips copied his letter to United Companies' Human Resources Director, Bill Spann. In his letter, Phillips referred to the letter from Waldrop's doctor advising of Waldrop's need for a leave of absence. Waldrop did not initially take the recommended leave of absence because his supervisor, D.C. Brantley, advised him that taking a leave would cause Waldrop to lose control of his office and loss of profits. Later, Joe Phillips, D. C. Brantley and Bill Spann went to Waldrop's office and told Waldrop he was going to take a leave of absence. Bill Spann did most of the talking at that meeting. The only reason Spann stated was Waldrop's need for a leave of absence due to his "health problems." App F at 100a-110a. Spann was Respondents' only witness to assert that Waldrop's leave was for disciplinary reasons. Under cross-examination, however, Spann was forced to recant his earlier testimony and admit that at the May, 1991 meeting, "[Waldrop] was. . . told . . . it was a medical leave . . . [and] not a disciplinary action." Waldrop, who suffers with severe diabetes, proved he had a doctor's recommendation and valid medical excuse for his leave of absence. App F at 136a-138a. United Companies' CEO, Terrell Brown, and its former vice president, Joe Phillips, also testified that Waldrop's leave of absence was granted for medical reasons and that it was not imposed upon Waldrop as any sort of disciplinary action. *Id.* Thus, neither

Waldrop nor any of Respondents' upper-level managers at the May, 1991 meeting believed or testified that the leave of absence was imposed on Waldrop as a disciplinary action. App F at 110a, 136a-138a, 178a-179a. Even Sandy Stafford testified that Waldrop's leave was due to his health problems. App F at 197a-198a.

As to Respondents' proffered explanations for firing Wyvill, Wyvill provided evidence that his so-called "disruptive and unauthorized" phone calls to two co-employees, Carl Scott and Sandy Stafford, were authorized. Wyvill testified that he made the phone call to Scott at the request of Tee Brown, the son of United Companies' CEO, Terrell Brown. Wyvill testified that Tee Brown asked him to make the calls for the purpose of investigating the "Unlink", an underground newspaper published by employees of United Companies which contained material that was bitingly critical of United Companies' management. App F 134a-135a. United Companies claimed that Tee Brown was a mere trainee who had no authority to request Wyvill to make such calls. App F at 178a. However, Tee Brown admitted he received a report from Wyvill about the Unlink matter. App F at 189a-190a. Tee Brown also testified that he discussed with his father, CEO Terrell Brown, whether his contacts with Wyvill caused Wyvill to be fired. App F at 190a.

Through the testimony of Michelle Barnett, an employee of Respondent Life Company who worked with Tee Brown, Wyvill proved that Tee Brown was much more than a "mere trainee." Barnett testified that Tee Brown asked her to work with him on two special projects which they submitted to the Life Company's president, Gary Warrington, and vice president, Lindsay Seals. App F at 167a-176a. Warrington and Seals admitted they met with Tee Brown on a regular basis while he worked in the Life Company, and that

he had provided certain reports to them. Barnett testified she helped Tee Brown prepare one of the reports which was presented to Warrington and Seales. That report dealt with correcting cost inefficiencies in the Life Company's business operations. *Id.* Their second meeting was for the purpose of finding what decisions the president had made. As a result of Tee Brown's "suggestions", a major policy change was implemented throughout the Life Company. *Id.*

With regard to Respondents' claim that Wyvill made an unauthorized or disruptive phone call to Sandy Stafford, Wyvill testified that his call to Sandy Stafford concerned a credit life insurance issue and that he never used the term "blood money" during his conversation with her.

CEO Terrell Brown and H. R. Director Bill Spann met with Wyvill after he was fired. Wyvill then disclosed that he had made the investigatory phone calls to Scott at the request of Terrell Brown's son, Tee Brown. Spann testified that, after meeting with Wyvill and hearing the reason for his phone calls to Scott, Spann and Terrell Brown discussed paying Wyvill $5,000 in addition to his severance pay. App F at 189a.

ANECDOTAL AND ADDITIONAL EVIDENCE

In addition to the evidence supporting their *prima facie* cases, and the evidence proving the falsity of Respondents' proffered reasons for firing them, Petitioners also offered extensive evidence concerning Respondents' attitude toward older employees. In the early 1990's, CEO Terrell Brown told his vice president, Joe Phillips, that Brown "...wanted the company to be mean and lean, and he wanted to go to a young, aggressive group of people." Phillips testified that Brown also told him he "...wanted to get the

company mean and lean, get rid of the people that were there, so that we can make more money, be more aggressive, more productive". App F at 131a-134a. Phillips stated that when Terrell Brown made this statement, a majority of Respondents' mid-level managers, such as Waldrop and Wyvill, were over 40 years of age. *Id.*

After hearing Terrell Brown's statements, Phillips became concerned about implementing Brown's policy, particularly in light of the liability it could create for Respondents. App F at 134a-135a. Phillips discussed his concerns about liability with Bill Spann. *Id.* Spann admitted that such a conversation took place. App F at 185a. Spann and Phillips then decided to teach their management employees how to "build a file" on employees who Respondents were planning to fire. App F at 135a. After these discussions, Spann prepared a release form which he required employees to sign when Respondents fired them. The release contained a clause stating that the fired employee would not sue Respondents for age discrimination. App F at 189a.

Garold Cooke, a former branch manager and area supervisor, testified about two instances where Respondents' managers were asked to falsify statements about older employees' records to protect Respondents when those employees were fired. App F at 127a-128a. Both Cooke and Davis testified that they heard Terrell Brown make derogatory remarks about older employees during that same time frame. *Id.* Davis stated that "on numerous occasions" he heard Terrell Brown say about the employees over forty who worked for Davis, "...the world had passed them by, that they were just too old to get the job done, and that we should either find another position for them or terminate them." App F at 151a. Cooke testified that, at a company meeting, he

heard Terrell Brown make a derogatory age-based remark about some of the older men at corporate headquarters; e.g. that Brown "...wished they would go away so that they could get some new blood in the company." App F at 127a-128a.

From the totality of the circumstances and during the time frame of their firings, Petitioners linked Brown's age-based remarks with Respondents' decision to fire them. Contrary to the Fifth Circuit's opinion, it was Terrell Brown who made the decision to fire Wyvill, not the Life Company president, Gary Warrington, and vice president, Lindsey Seales. App F at 155a-156a. Joe Phillips testified that he and Bill Spann had to get Terrell Brown's permission to fire Waldrop. App F 157a-159a. The Fifth Circuit disregarded Petitioners' evidence that Respondents had terminated other similarly situated, older managers during the same time frame. For example, both Garold Cooke and Jim Davis were branch managers in Respondents Lending Company and over the age of 40 when they were fired in the early 1990's. App F at 127a-131a. Further, after Terrell Brown made his disparaging age-based remarks about Respondents' older employees, his Vice President, Joe Phillips, and Human Resources Director, Bill Spann, participated in the firing of Cooke, and Brown, Phillips and Spann participated in the firing of Davis.

Petitioners also provided ample evidence from which the jury could reasonably infer that Respondents "built files" on Waldrop and Wyvill in preparation for firing them. Respondents' file building against Petitioners began shortly after Phillips and Spann discussed the need to implement Terrell Brown's policy of ridding Respondents of their older employees.

Further, Waldrop provided evidence that, during the same time frame that Waldrop had been accused of abusive behavior, one of Respondents' younger branch managers, Dwayne Burks, had engaged in egregiously abusive conduct toward his employees (e.g. uncontrollable tirades, destroying office equipment, shouting obscenities, etc.). Waldrop proved that Respondents treated the under-40 manager, Burks, much more leniently than the purported disciplinary leave Respondents claimed they compelled Waldrop to take. App F at 145a-147a, 179a-185a. Burks was not in the protected age group. Beginning in 1991, Burks' subordinates complained to Respondents' Human Resources department about his abusive behavior, but Respondents took no action until 1996. *Id.* At the time these complaints were made, Burks was a branch manager. Incredibly, after a complaint was lodged against Burks in 1993, Respondents promoted him from branch manager to area supervisor. *Id.* In 1996, after Respondents received even more complaints about Burks' abusive behavior, the Human Resources department gave Burks copies of the disgruntled employees' letters and allowed him the opportunity to respond to the complaints. In sharp contrast, Waldrop did not discover that his staff had written any such letters about him until after he sued Respondents. App F at 118a-121a. The most damaging disparity between Respondents' treatment of its abusive, under-40 manager, Dwayne Burks, and Waldrop was that long after Respondents learned of and confirmed the extent of Burks' abusiveness toward his employees, he was not terminated. Instead, Respondents gave Burks a transfer to another job in which he worked on special projects with the president of Respondent Lending Company. Respondents also paid for Burks' psychiatric counseling until the time of his voluntarily resignation. App F at 179a-185a. Waldrop, on the other hand, was fired. The jury could reasonably infer from the

evidence that Respondents treated Waldrop much more harshly than Burks due to his age.

Petitioners also provided evidence that twenty-five employees quit their jobs because of Burks' misconduct. App F 154a. Only two of Waldrop's employees, Pam McMillan and Cheryl Welch, claimed they left because of his alleged abusive conduct. Even then, Waldrop provided evidence from which the jury could reasonably infer that McMillan and Welch left for other reasons. Waldrop proved that McMillan left a series of jobs, prior to and after her employment with Respondents, for the same reason she gave concerning Waldrop, *e.g.* that her previous managers were incompetent or not to her liking. App F at 201a-204a. Welch worked for Respondents on two separate occasions. During both occasions she worked for Waldrop at his branch in Dalton. At the time of her second departure, Welch complained about her pay and workload as a part-time employee, rather than abusive behavior by Waldrop. App F at 193a-194a. Thus, Waldrop's evidence raised substantial questions of fact as to whether McMillan or Welch were truthful in testifying that they resigned because of Waldrop's abusive conduct, facts which the jury considered in the totality of the evidence and decided in favor of Waldrop.

Waldrop and Wyvill also proved that other middle level managers were fired who were over 40. In each of those instances, Respondents' same upper level management team participated in those firings and the dismissed employees were replaced by younger persons. Petitioners' offered evidence that these people were dismissed because of CEO Terrell Brown's policy to rid Respondents of their older employees, which was carried out very effectively by Brown's' vice president, Joe Phillips, and his Human Resources Director, Bill Spann.

PANEL OPINION

A panel of the Fifth Circuit Court of Appeals ignored virtually all of Petitioner's evidence, reversed the jury's verdict, vacated the district court's judgment in favor of Petitioners and remanded the case to the district court for the entry of judgment as a matter of law in favor of Respondents. App. A at 21a. The panel stated that ". . . [e]ven assuming the truth of [plaintiffs'] allegations, they allow at best an inference that United Companies' proffered explanations for the discharges were false." *Id.* at 20a. The panel also held that the district court abused its discretion by allowing into evidence "anecdotal testimony from and about other employees" who were fired after Terrell Brown made his so-called "stray remarks" and Phillips and Spann began implementing Brown's policy of ridding Respondents of their older employees. *Id.* at 11a. The panel's rationale was that the older employees who were fired " held different jobs than [Petitioners], executed different duties, and were accountable to different supervisors", and their "unrelated contention[s] of age discrimination . . . substantially prejudiced United Companies." *Id.* at 13a-14a. Petitioners proved, however, that those employees were all mid-level managers and that they were fired due to Respondents' company-wide animus toward older employees, as initiated by the Chief Executive Officer, Terrell Brown. Petitioners proved that "[Respondents'] supervisors violated their own standard employee disciplinary procedures" in an effort to "'build a file' on older workers", which Respondents then "used as a fig-leaf to cover any illegal employment actions." *Id.* At 18. But, the panel dismissed that evidence as being irrelevant absent "any nexus between plaintiffs' allegation of file-building and their ages". *Id.* As for Respondents' favorable treatment of Dwayne Burks, the younger supervisor whose egregious abusiveness was compared to Waldrop's alleged

abusive conduct, the panel ruled that that was not evidence of Respondents' age discrimination against Waldrop because the circumstances surrounding Burks and Waldrop were not "nearly identical." *Id.*

Two weeks after the panel's decision, this Court, in a unanimous decision, clarified the nature of proof required to sustain a jury's finding of age discrimination, and the standard of review to be followed under Fed. R. Civ. P. 50 for granting judgment as a matter of law. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000). Petitioners then timely petitioned the Fifth Circuit for a rehearing en banc based on this Court's decision in *Reeves*. Although one panel judge would have granted a rehearing based on the *Reeves* decision, the other two panel judges and the remaining Fifth Circuit judges ignored *Reeves* and denied the petition for rehearing en banc.

ARGUMENT

In *Reeves*, which was also an age discrimination case in which the Fifth Circuit reversed the jury's verdict and district court's judgment in favor of the plaintiff, this Court resolved a split among the Circuit Courts of Appeal as to the evidence necessary to sustain a jury's verdict that an employer discriminated against an employee on the basis of age. This Court held that:

> A plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668, and subsequent decisions), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision,

> may be adequate to sustain a finding of liability for intentional discrimination under the ADEA.

App. E at 72a.

In *Reeves*, the plaintiff made out a *prima facie* case and made a substantial showing that the defendant's otherwise legitimate, nondiscriminatory explanation for firing plaintiff, e.g. plaintiff's shoddy recordkeeping, was false. *Id.* at 76a-78a. As they did in the instant case, the Fifth Circuit in *Reeves* ignored the evidence that established plaintiff's *prima facie* case and proved that the defendant's proffered explanation for firing him was false. Instead, the Fifth Circuit reviewed only the "additional evidence" offered by Reeves to support his claims and rebut the defendant's pretextual explanations. In response to the Fifth Circuit's use of an improper standard of review in its *Reeves* decision, this Court held,

> It is therefore apparent that the [Fifth Circuit] believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand. In so reasoning, the court misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence.

Reeves, App. E at 79a.

This Court, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), described the indirect evidence a plaintiff could use to prove a discrimination case: "Proof that the defendant's explanation is unworthy of credence is simply one

form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. *See Id.*, at 517, 113 S.Ct. 2742." *Id.* at 80a-81a.
This Court further stated that:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt". *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992); *see also Wilson v. United States*, 162 U.S. 613, 620-621, 16 S.Ct. 895, 40 L.Ed. 1090 (1896); 2 J. Wigmore *Evidence* § 278(2), p. 133 (J. Chadbourn rev. ed. 1979).

Id. at 81a.

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination. *Id.* at 511, 113 S.Ct. 2742.

Id. at 80a.

This Court also held in *Reeves* that the Fifth Circuit ". . . misapplied the standard of review dictated by Rule 50", because "the [Fifth Circuit] disregarded critical evidence favorable to [Reeves] . . . the evidence supporting [his] *prima facie* case and undermining respondent's nondiscriminatory explanation. . . . [and the Fifth Circuit] also failed to draw all reasonable inferences in [Reeves'] favor. . " *Id.* at 87a. This Court went on to define the standard for judgment as a matter of law under Fed. R. Civ. P. 50 as follows:

> In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence..."Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby, Inc., supra*, at 255; 106 S.Ct. 2505...
>
> Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. *See* Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.*, at 300. (Citations omitted).

Id. at 87a.

In reversing the Fifth Circuit's judgment in *Reeves*, this Court held that the respondent-employer was not entitled

to a judgment as a matter of law because there was sufficient evidence for the jury to conclude that the employer had intentionally discriminated against Reeves due to his age. The "sufficient evidence" cited by this Court was that Reeves: "had established a *prima facie* case", "introduced enough evidence for the jury to reject respondent's explanation", and "produced additional evidence" that the management employee who fired Reeves was motivated by age-based animus.

Further, this Court held that the Fifth Circuit ". . . misapplied the standard of review dictated by Rule 50" because it ". . disregarded evidence favorable to Reeves- -the evidence supporting his *prima facie case* and undermining respondent's nondiscriminatory explanation - - and failed to draw all reasonable inferences in [Reeves'] favor." *Id.* Because of the these errors, this Court reversed the Fifth Circuit's decision to grant the respondent a judgment at law.

Even so, the Fifth Circuit stubbornly refuses to follow this Court's holdings in *Reeves* and continues to misconceive the burden of proof required of petitioners who bring age discrimination cases. Furthermore, the Fifth Circuit continues to misapply the standard of review required by Rule 50.

In the instant case, as in *Reeves*, Petitioners made out a *prima facie* case. Both Waldrop and Wyvill, who were over 40, qualified and performing well in their jobs, were replaced by younger persons after being fired. Both of them raised serious questions about the validity of Respondents' explanation for firing them. United Companies said it fired Waldrop because he was abusive to some of his employees and customers. Waldrop denied he was abusive and his immediate supervisor, D. C. Brantley, testified that the

employees who accused Waldrop had lied about reporting the alleged abuse to Brantley. Brantley did not recall any of those employees complaining to him about Waldrop being abusive. To counter United Companies' contention that Waldrop's leave of absence was imposed as a disciplinary action, Waldrop proved that his leave was taken because he suffered from diabetes. D. C. Brantley, Joe Phillips, Terrell Brown, Pam McMillan and Sandy Stafford all testified that Waldrop's leave of absence was not the result of a disciplinary action, but rather a necessary consequence of his severe medical problems. Waldrop also offered evidence that he treated his employees extremely well, giving them a significant portion of his annual bonuses, allowing them to work flexible hours in order to have more time with their families, providing them with fair pay raises and promoting them when they deserved it.

Wyvill presented substantial evidence of the falsity of Respondents' claim that he was fired because he made unauthorized and disruptive phone calls. He presented evidence that he was requested to make the phone call to Carl Scott by Tee Brown, the son of Respondents' CEO, Terrell Brown. In his testimony, Tee Brown's admitted he had sought and received a report from Wyvill about the "Unlink" underground newspaper. Regarding the alleged "disruptive" to Sandy Stafford, Wyvill testified unequivocally that he never told Stafford she would be accepting "blood money" if she took Waldrop's place as a branch manager. Wyvill also presented evidence that his call to Stafford was in response to her question about a credit life insurance matter, which he was responsible for handling as manager of the credit life department of Respondents' insurance company. Finally, Wyvill presented evidence that Respondents' CEO, Terrell Brown, and Human Resources Director, Bill Spann, discussed paying Wyvill an extra $5,000 over the normal severance pay

after they learned that Terrell Brown's son, Tee Brown, had asked Wyvill to make the phone calls concerning Tee Brown's investigation of the "Unlink". Thus, Wyvill provided substantial evidence that the phone calls he made to Scott and Stafford were either authorized by Tee Brown or required by Wyvill's position and responsibilities as a manager for Respondents.

In reaching its decision, the Fifth Circuit impermissibly ignored or dismissed as irrelevant virtually all of Petitioners' evidence. In ruling that Petitioners' evidence was lacking, the Fifth Circuit made the following statements, which are almost identical to its statements in *Reeves*,[1]: "Having comprehensively reviewed the evidence, we conclude that while plaintiffs' evidence may have cast doubt on the proffered explanations for their firing . . . it was insufficient to show that the real reason was age discrimination" App. A at 10a; Petitioners' "[evidence] might have been sufficient to cast doubt on United Companies' proffered explanations for plaintiffs' discharges, but it did nothing to raise an inference that the real reasons for the discharges were related to age"; and, "[Petitioners' evidence] allow[s] at best an inference that United Companies' proffered explanations for the discharges were false . . . [but] . . . notably fails to connect the plaintiffs' discharges to their ages and it therefore does not permit an inference that age was a motivating factor in their terminations." App. A at 20A. It

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[1] In its *Reeves* decision, the Fifth Circuit "acknowledged that [Reeves] 'very well may' have offered sufficient evidence for 'a reasonable jury [to] have found that [Sanderson's] explanation for its employment decision was pretextual," but nonetheless held that such evidence was insufficient to sustain finding of age discrimination.

seems clear from these statements the Fifth Circuit recognized that Waldrop and Wyvill raised serious doubts about the truthfulness of United Companies' explanations for firing them. But, in direct contravention of this Court's decision in *Reeves*, the Fifth Circuit again misconceived Petitioners' burden of proof, holding that the proof of their *prima facie* cases, and their evidence rebutting the validity of United Companies' proffered explanations for firing them, was not sufficient to support their age discrimination claims.

In the statement of facts set out in its opinion, the Fifth Circuit emphasizes only those facts which Respondents offered in opposition to Petitioners' claims. By all but ignoring Petitioners' evidence and considering for the most part only the evidence offered by Respondents, the Fifth Circuit violated the requirements of Fed. R. Civ. P. 50 by impermissibly weighing the evidence and making credibility determinations about the witnesses in this case. Rule 50 and this Court's decision in *Reeves* mandate that weighing the evidence and determining the credibility of witness are the province of the jury, not the appellate court.

As in *Reeves*, the district court here properly charged the jury on Petitioners' burden for proving their age discrimination claims: "to succeed in his claim, the plaintiff must prove by a preponderance of the evidence: . . . (4) that age was one of the reasons Defendants discharged him . . . [and] . . . [t]hus, the element in dispute is whether defendants discharged the plaintiff because of his age as a determinative factor in its consideration." App. B at 28a. The Fifth Circuit Court simply disregarded the jury's verdict and the district court's well-reasoned denial of Respondents' motion for a judgment as a matter of law, according no deference to the district court's findings that Petitioners had made out a *prima facie* case and had presented sufficient

evidence from which a jury could and did determine that Respondents' proffered explanations for firing Petitioners were pretextual.

As in *Reeves*, the Fifth Circuit's decision in this case is due to be reversed and the jury's verdict reinstated because Petitioners' evidence establishing their *prima facie* case, and their evidence rebutting Respondents' proffered explanations for their terminations, along with their additional evidence proving the age-based animus of Respondents at the time they were fired, proves that the petitioners were fired because they were "too old" to suit CEO Terrell Brown.

THE FIFTH CIRCUIT'S REVIEW OF PETITIONERS' ADDITIONAL EVIDENCE

As it did in *Reeves*, the Fifth Circuit confined its review of the evidence to only the "additional evidence" offered by Petitioners to prove their claims against Respondents. This further confirms that, in deciding this case, the Fifth Circuit did not consider Petitioners' proof of their *prima facie* case and the rebuttal evidence they offered in opposition to Respondents' proffered explanations firing Petitioners.

The Fifth Circuit also separately considered each piece of additional evidence offered by Waldrop and Wyvill in support of their case (*e.g.*, Terrell Brown's age-related remarks, anecdotal testimony given by similarly situated employees, the disparate treatment of Dwayne Burks offered in Waldrop's case and the evidence regarding file-building). However, all of this evidence was introduced to prove United Companies' treatment of its older mid-level management employees in the early 90's. Terrell Brown's age-related

remarks, which he made in the early part of the '90's, came from the one person who had the ability to set policy for the company. As a result of Brown's remarks, Joe Phillips and Bill Spann took certain actions to protect United Companies. These men encouraged managers to build files to cover the real reason they were firing older employees. Waldrop and Wyvill offered proof that files were built by Garold Cooke on other people who were fired. Cooke and Jim Davis, who were branch managers, testified that they were fired by Brown or Phillips and Spann during this same time frame for reasons which were false.

Due to the implementation of Brown's policy, many of United Companies' mid-level managers who were over 40 were fired in the early '90's and replaced with younger people. Perhaps most importantly, Brown, who made the remarks and caused the policy to be implemented, participated in firing both Waldrop and Wyvill.

The Fifth Circuit also failed to follow its own precedent. In *Reeves v. General Foods Corp.*, 682 F.2d 515, 524 (5th Cir. 1982), the Fifth Circuit held that anecdotal or indirect evidence was admissible in a discrimination case and should be considered along with all the other evidence offered by petitioners as a whole, including all reasonable inferences the jury could draw from that evidence.

By addressing each piece of additional evidence offered by the petitioners, separately, the Fifth Circuit sought to require each piece of separate evidence to stand alone in support of a case of age discrimination. This is clearly error. Under *Futrell v. J. I. Case*, 38 F.3d 342, 350 (7th Cir. 1994), the Seventh Circuit Court of Appeals stated:

> [W]hen a plaintiff uses the indirect method of proof, no one piece of evidence need support a finding of age discrimination...[T]o require...that each piece of circumstantial evidence "standing alone" be sufficient to support a finding of age discrimination is to render meaningless the indirect method of proof, and invite the pretexts that can render the ADEA a nullity.

By reviewing this evidence on a disjunctive basis, the Fifth Circuit misapplied the standard for determining whether to grant a judgment at law. The Fifth Circuit's refusal to review the additional and indirect evidence in its totality effectively denied the petitioners the benefit of all the reasonable inferences which could be drawn from that evidence.

A careful reading of the Fifth Circuit's opinion reveals its use of this disjunctive approach. The Fifth Circuit Court stated that: (1) "Assuming, as plaintiffs' allege, that Brown, Sr. was one of the decision-makers in the terminations of Wyvill and Waldrop, his 'stray remarks' are insufficient to create an inference of age discrimination." App. A at 16a; and, (2) "In the absence of any nexus between plaintiffs' allegation of file-building and their ages, such assertions are insufficient to create an inference that plaintiffs were fired on account of age." *Id.*, at 19a.

Under the heading of additional evidence of age discrimination, the Fifth Circuit went through a litany of some of the evidence offered by the petitioners, such as Wyvill's introduction of evidence that Tee Brown asked him to make the phone calls and testimony introduced by Waldrop that D. C. Brantley, his supervisor, was largely to blame for

Brantley's own employment problems. Then the Fifth Circuit said that even though this evidence "allow[s] at best an inference that United Companies' proffered explanations for the discharges were false. . .[t]his evidence. . .does not permit an inference that age was a motivating factor in the terminations." App. A at 20a.

As the Seventh Circuit Court of Appeals said in *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 19-20 (7th Cir 1987):

> This approach all but amounts to a rule that only direct evidence of intent can establish age discrimination. Yet federal courts have long permitted plaintiffs to submit indirect evidence of discrimination. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 717, 103 S.Ct. 1478, 1483, 75 L.Ed.2d 403 (1983)("The district court erroneously thought that [the employee] was required to submit direct evidence of discriminatory intent.").
>
> When a plaintiff uses the indirect method of proof, no one piece of evidence need support a finding of age discrimination. Age discrimination, like other forms of discrimination is often subtle and even subconscious. *LaMontagne*, 750 F.2d at 1410. "There will seldom be 'eyewitness' testimony as to the employer's mental processes." *Aikens*, 460 U.S. at 716, 103 S.Ct. at 1482. As a result, plaintiffs have great difficulty in gathering information and often can present only circumstantial evidence of discriminatory

> motives. Therefore, to require, as did the district court, that each piece of circumstantial evidence "standing alone" be sufficient to support a finding of age discrimination is to render meaningless the indirect method of proof and invite the pretexts that can render the ADEA a nullity.

The Fifth Circuit dismissed Terrell Brown's age-related remarks as "stray remarks" which were remote in time to the firing of Waldrop and Wyvill. This analysis of those remarks ignores the fact that CEO Brown made the remarks in 1991, and he made the decision to fire Wyvill and approved the firing of Waldrop.

Further, CEO Terrell Brown's so-called age-related "stray remarks" are admissible as proof of a bias toward older employees on the part of an individual who had the ultimate authority to establish employment policies, and who participated in the decision to fire Waldrop and Wyvill.. See *Aikens*, 460 U.S. at 713-714 n. 2. This fact alone creates the appropriate nexus between Brown's remarks and the firing of Waldrop and Wyvill. Terrell Brown's remarks are certainly relevant to this case, and the jury had a right to hear about them.

The evidence offered through Joe Phillips, all of which the Fifth Circuit impermissibly sought to discount by stating he had also sued United and as a result, his testimony should not be believed, clearly established that the policy resulting from Brown's remarks was evidence of an animus toward older employees which existed at United Companies. This evidence was certainly permissible to establish the "standard policy and practice" United Companies followed toward older employees. See *McDonnell Douglas*, *supra*. 804-805.

Waldrop's proof that Dwayne Burks, who was not in the protected age group, was treated differently than he was, even though he was also charged by United Companies with being abusive to his employees, is highly relevant to show pretext. *Id.*,at 804.

In looking at additional evidence offered by Waldrop and Wyvill, the Fifth Circuit impermissibly weighed evidence and made determinations about the credibility of various witnesses. For instance, in distinguishing the treatment Burks received with that received by Waldrop, the Fifth Circuit said Burks' actions were different because he did not antagonize his immediate supervisor. However, the reason United Companies gave for firing Waldrop was his alleged abusive action toward his employees, not his supervisor. In any event, Waldrop offered evidence during the trial from which a jury could infer that Brantley did not get along with his employees because of his management style. App F at 150a-154a. Amazingly, in its efforts to discount the evidence about Burks, the Fifth Circuit said Waldrop was treated better than Burks, even though Waldrop was fired and Burks was promoted when his abusive behavior was brought to Bill Spann's attention in 1993.

In discounting the testimony of Jim Davis and Garold Cooke, the Fifth Circuit found from the evidence that neither man was in the same position as Waldrop when they were fired. To reach this decision, the Fifth Circuit had to ignore the proof offered by Waldrop and Wyvill that both of these men were fired in the early 90's by Brown or, as a result of the implementation of his policies, by Phillips and Spann, and that they were branch managers in the Lending Company at that time. Both testified that files were built on them which contained false material. Cooke testified he built files on other people who were dismissed during the same time

period. The Fifth Circuit impermissibly ignored this evidence offered through Cooke and Davis.

The panel supported its exclusion of petitioners' indirect evidence by citing only those cases where an appellate court reversed a trial judge's exclusion of anecdotal or indirect evidence in a discrimination case. Where the trial judge has excluded information from the record, the standard of review on appeal is different than the standard the appellate court must follow when reviewing a trial judge's allowance of anecdotal evidence in an age discrimination case. In the first instance, the appellate court must decide whether the trial court abused its discretion in excluding the evidence. However, as in the instant case, when the trial court has ruled that anecdotal evidence is admissible and relevant, and the jury finds age discrimination based upon that evidence and the other evidence presented, the appellate court must then look at all of the evidence, including anecdotal evidence, and determine if the evidence is sufficient to prove discrimination. *See Reeves v. Sanderson, supra.*

CONCLUSION

Gerald Waldrop and Ridgely Wyvill presented sufficient evidence from which the jury could find that United Companies willfully discriminated against them because of age. Because they refused to follow the holdings of this Court in the *Reeves* case, the Fifth Circuit Court of Appeals did not consider that evidence, much of which was circumstantial, and continues to insist in this case and in other cases it has decided since the *Reeves* decision to require plaintiffs who make out discrimination cases prove that discrimination by direct evidence. These decisions by the Fifth Circuit make the federal laws proscribing discrimination based on race, gender or age a nullity in that jurisdiction. The position taken

by the United States Court of Appeals for the Fifth Circuit in this case and in other employment discrimination cases is in direct conflict with this Court's decision in *Reeves*. Therefore, review by this Court is warranted.

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed May 31, 2000]

No. 98-30287

J. R. RIDGLEY WYVILL
Plaintiff/Appellee/
Cross-Appellant,

v.

UNITED COMPANIES LIFE INSURANCE COMPANY, UNITED COMPANIES FINANCIAL CORPORATION
Defendants/Appellants/
Cross-Appellees,

UNITED COMPANIES LENDING CORPORATION
Appellant/Cross-Appellee.

GERALD W. WALDROP
Plaintiff/Appellee/
Cross-Appellant,

v.

UNITED COMPANIES FINANCIAL CORPORATION, UNITED COMPANIES MORTGAGE OF GEORGIA	)
Defendants/Appellants/ Cross-Appellees,	)
UNITED COMPANIES LENDING CORPORATION	)
Appellant/Cross-Appellee.	)

Appeals from the United States District Court for the Middle District of Louisiana

Before **JONES, BARKSDALE**, and **DENNIS**, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellant United Companies appeals from the judgment of the district court, entered upon a jury verdict, awarding substantial damages to two former employees under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. Unfortunately, the verdict depends on evidence that this court and others have held inadmissible to support an inference of age discrimination. In particular, the district court allowed the plaintiffs to saturate the record with testimony pertaining to other employees in other branches of the company who held different positions under different supervisors and were terminated at different times. Shorn of this and other irrelevant evidence, the judgment cannot stand.

I. BACKGROUND

Gerald Waldrop began work with United Companies Lending Corporation (the "Lending Company"), a subsidiary company of defendant United Companies Financial Corporation ("United Companies"), in 1983 as branch manager in Dalton, Georgia.[1] Waldrop's duties included the production of a certain number of loans per month, ensuring that branch staff adequately processed new and existing loans, collecting loans to minimize delinquency rates, and maintaining balanced escrow logs. From 1991 to 1993, the period relevant to this litigation, Waldrop supervised four employees: Sandy Stafford, who was assistant manager; Pat McMillan; Cheryl Welch; and Pat Little. During this period, Waldrop was supervised by D. C. Brantley, who was two years older than Waldrop, and Brantley was in turn supervised by Joe Phillips. Waldrop was terminated from his job in January 1993 when he was forty-seven years old.

According to United Companies, Waldrop's relationship with Brantley began to deteriorate in1990. Waldrop struck Brantley in the back of the head at a Company function, calling him a son-of-a-bitch, and threatening to "whip his ass" if he ever came to Dalton. When United Companies dismissed Waldrop's son in early 1991, the discord between Waldrop and Brantley escalated. During a telephone conversation among Waldrop, Brantley and Phillips, Waldrop allegedly threatened Brantley with physical

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[1] Waldrop was hired by United Mortgage of Georgia which was later merged with United Companies Lending Corporation.

harm and told him to keep out of the dispute. Waldrop's insubordination became so intolerable that Brantley sent a memorandum to Phillips asking to be relieved from supervision of the Dalton branch. Waldrop also had problems with the Dalton branch employees. His abusive behavior towards staff and customers was brought to the attention of William S. Spann, Jr., United Companies' Director of Human Resources, by Sandy Stafford.

In May 1991, Waldrop was given a six-week paid leave of absence. Waldrop contends that medical problems associated with his diabetes forced this leave, while United Companies argues that the leave was necessitated by Waldrop's problems in the office and with his supervisor. Upon Waldrop's return, his relationship with his staff did not improve. In the fall of 1991, he brought both Stafford and Welch to tears after separate outbursts. In November 1991, Spann and Phillips reprimanded Waldrop and made him apologize to his employees.

A year later, two of the Dalton branch employees – McMillan and Welch – left the Lending Company. In post-resignation letters to Spann, they blamed Waldrop's behavior for their departures. After receiving these letters, Spann called McMillan, Welch, and Stafford and discovered that Waldrop's behavior had not improved. He discussed Waldrop's behavior with Phillips and they decided to terminate Waldrop. Spann (age 47), Phillips (age 45), and Brantley (age 49) attended the meeting at which Waldrop was dismissed.

Waldrop does not dispute these events. Rather, he points out that throughout his employment, he and his branch

were consistently among the top ten performers in the Lending Company, in terms of quantity and profitability of the loans produced. He also asserts that new employees were often sent to him for training and that several of his assistant branch managers became successful managers of their own branches. In addition, he offered evidence that Stafford and McMillan visited his home after his termination, Stafford to ask for his blessing in succeeding him as branch manager, and McMillan to show him her grandchild. Waldrop contends that these visits were not the actions of employees afraid of or antagonized by an abusive and rude boss.

J. R. Ridgley Wyvill began employment with United Companies Life Insurance Company (the "Life Company"), a subsidiary of United Companies, in 1978. From 1980 until his dismissal in February 1993, Wyvill managed the credit life department in Baton Rouge, Louisiana. He was supervised by Lindsay Seals, an executive vice-president of the Life Company, who in turn reported to Gary Warrington, the president of the Life Company.

In January 1993, Wyvill made several allegedly disruptive phone calls to employees of the Lending Company about Waldrop's termination. Carl Scott, a Lending Corporation branch manager in Nashville, heard from Wyvill on January 29, 1993, three days after Waldrop had been fired. Wyvill informed Scott that United Companies "had gotten the Chief," referring to Waldrop, and he warned Scott to "watch his backside." Scott testified that he did not know Wyvill before this call and that the call upset him. He reported the call to Phillips.

The second call was made to Sandy Stafford, Waldrop's assistant manager. Like Scott, Stafford did not know Waldrop and had only met him on two previous occasions during her nine years with United Companies. Stafford was being considered as a replacement for Waldrop, and Wyvill warned her that if she took the position, she would be taking "blood money." Later, Wyvill called Stafford again and asked her to lie to United Companies management who were investigating his telephone calls. Stafford refused.

According to Wyvill, he place these calls at the behest of Tee Brown, Jr., the son of Terrell Brown, Sr., the CEO of United Companies. The younger Brown wanted Wyvill to investigate an underground newspaper at United Companies, *The Unlink,* that had been critical of United Companies management.

Upon receiving Scott's report about Wyvill's phone call, Phillips pulled the telephone record of calls made from Wyvill's office and discovered that Wyvill had placed phone calls to several former employees who had been terminated or had left under unpleasant circumstances. Phillips notified Spann about these calls, and Spann and Roger Clark, the president of the Lending Corporation, called Stafford and were told about Wyvill's phone call to her.

A meeting was then held, attended by United Companies senior management and Wyvill, where Wyvill was questioned about the nature of his calls. Wyvill did not mention that the calls were part of his investigation into *The Unlink*. Finding Wyvill's explanations insufficient, Wyvill's direct supervisors, Seals (age 58) and Warrington (age 53), with the agreement of the assembled managers, terminated

him effective February 1, 1993. Wyvill was fifty-three years old.

According to Wyvill, his silence with regard to *The Unlink* investigation was meant to protect Tee Brown. Wyvill later produced testimony that when Brown, Sr. discovered that his son had put Wyvill up to the calls, he paid Wyvill $5000 to "leave quietly."

Both Wyvill and Waldrop sued their former employers. Their cases were consolidated over the dissent of United Companies. After procedural skirmishing and a mistrial followed by a six-day trial, the jury returned a verdict finding that the plaintiffs had been discriminated against because of their age and that the discrimination had been willful. The jury awarded Waldrop $76,569.00 in back pay and Wyvill $186,939.00 in back pay. The district court entered judgment on the jury's verdict, effectively doubling each man's back pay award because of the finding of wilfulness. 29 U.S.C. § 626(b). Front-pay to Wyvill, pre-judgment interest, and attorneys' fees were added to the judgment.

United Companies appeals, renewing its arguments, properly preserved in the district court, that the verdict was not supported by substantial evidence and that the district court erred in admitting testimony about and from former United Companies employees who were not similarly situated to either Wyvill or Waldrop. In addition, United Companies appeals, and Wyvill and Waldrop cross-appeal, various issues relating to damages. Because we reverse for evidentiary errors and insufficient proof of liability, we do not reach the parties' other arguments.

II. DISCUSSION

A. Standard of Review

We review the district court's denial of a motion for judgment as a matter of law de novo. Scott v. Univ. of Miss., 148 F.3d 493, 503 (5th Cir. 1998). "'A motion for judgment as a matter of law...in an action tried by jury is a challenge to the legal sufficiency of the evidence.'" Id., quoting Harrington v. Harris, 118 F.3d 359, 367 (5th Cir. 1997). Jury verdicts are considered under the standards established in Boeing Co. v. Chipman, 411 F.2d 365, 374 (5th Cir. 1969)(en banc), overruled on other grounds, Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997)(en banc), viewing all the evidence and drawing all reasonable inferences in the light most favorable to the verdict. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996)(en banc), citing Boeing, 411 F.2d at 374.

Under Boeing, there must be a conflict in substantial evidence to create a jury question. Scott, 148 F.3d at 504, "Substantial evidence is defined as 'evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions.'" Rhodes, 75 F.3d at 993, quoting Boeing, 411 F.2d at 374. "A mere scintilla of evidence is insufficient to present a question for the jury." Boeing, 411 F.2d at 374.

B. Analysis of Plaintiffs' Claims

In the absence of direct proof of discrimination, the plaintiff in an age discrimination case must follow the three-step burden-shifting framework laid out in McDonnell

Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). United Companies argues that Wyvill and Waldrop failed to set out the McDonnell/Douglas-Burdine prima facie case of age discrimination, and their claims should be dismissed. However, because this case has been fully tried on the merits, we "need not address the sufficiency of [plaintiffs'] prima facie case, and may instead proceed directly to the ultimate question of whether [plaintiffs] have produced sufficient evidence for a jury to find that discrimination has occurred." Atkin v. Lincoln Property Co., 991 F.2d 268, 271 (5th Cir. 1993)(quotations omitted).

The critical issue is thus whether Waldrop and Wyvill produced sufficient evidence that United Companies' explanation for their discharges was merely a pretext for age discrimination. In Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996)(en banc), the Fifth Circuit discussed the burden confronting an ADEA plaintiff trying to prove pretext:

> [A] jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employe and (2) creates a reasonable inference that age was a determinative factor in the actions of which the plaintiff complains. The employer, of course, will be entitled to . . . judgment if the evidence taken as a whole would not allow a

> jury to infer that the actual reason for the discharge was discriminatory.

Rhodes, 75 F.3d at 994. United Companies argues that Plaintiffs did not meet this burden, and we agree. Having comprehensively reviewed the evidence, we conclude that while plaintiffs' evidence may have cast doubt on the proffered explanations for their firing or on the soundness of the company's business decision, it was insufficient to show that the real reason was age discrimination.

C. Plaintiffs' Evidence of Pretext

1. Anecdotal Evidence

Plaintiffs strongest age-related evidence was "anecdotal" testimony from former United Companies employees that United Companies had a "pattern and practice" of discriminating against older workers. This evidence included witnesses' subjective beliefs that they and others had been terminated on account of age. United Companies argues that these anecdotal accounts of discrimination should have been excluded as incompetent to support a claim of pattern or practice discrimination. We agree.

A trial judge's ruling on the admissibility of evidence is generally reviewed for an abuse of discretion. Mooney v. Aramco Services Co., 54 F.3d 1207, 1220 (5th Cir. 1995). "We will not reverse a district court's evidentiary rulings unless they are erroneous and substantial prejudice results. The burden of proving substantial prejudice lies with the party

asserting error." Id., quoting FDIC v. Mijalis, 15 F.3d 1314, 1318-19 (5th Cir. 1994).

Plaintiffs introduced anecdotal testimony from and about former employees in an effort to show that United Companies, a company of 2700 employees, had a "pattern or practice" of discriminating against older workers. A "pattern or practice" of discrimination does not consist of "isolated or sporadic discriminatory acts by the employer." Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875, 104 S.Ct. 2794, 2799, 81 L.Ed.2d 718 (1984). Rather, as the Supreme Court has explained, "it must be established by a preponderance of the evidence that [the impermissible] discrimination was the company's standard operating procedure – the regular rather than the unusual practice." Cooper, 104 S.Ct. at 2799 (citations omitted). Often, an illegal pattern and practice is revealed with statistical proof.

Anecdotes about other employees cannot establish that discrimination was a company's standard operating procedure unless those employees are similarly situated to the plaintiff. Mooney, 54 F.3d at 1221. This court and others have held that testimony from former employees who had different supervisors than the plaintiff, who worked in different parts of the employer's company, or whose terminations were removed in time from the plaintiff's termination cannot be probative of whether age was a determinative factor in the plaintiff's discharge. See id.[2]

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[2] Goff v. Continental Oil Co., 678 F.2d 593, 596-97 (5th Cir. 1982)(upholding the exclusion of testimony from former employees who did not work with plaintiff and who had no

In this case, the plaintiffs' anecdotal evidence did not involve similarly situated employees. With regard to Wyvill, none of the former employees who testified or who were testified about worked in the Life Company. The Life Company was a separately incorporated entity with different management independent from the Lending Company. None of the former employee witnesses was supervised by either Lindsay Seals or Gary Warrington, Wyvill's supervisors. None of the former employees was terminated under circumstances similar to Wyvill's. It is true that several of the former employees could testify to their relationship with Bill Spann, who participated in firing Wyvill. But this single coincidence between Wyvill's experience and that of the anecdotal witnesses could not render them similarly situated.

Regarding Waldrop, none of the witnesses were branch managers in the Lending Company and none had been supervised by D. C. Brantley within a reasonable time of Waldrop's termination in 1993. Jim Davis, for example, was a regional vice-president of the Lending Company with duties that included supervision of sixty-five branch offices. He reported to Joe Phillips, and he testified that Phillips and Bill Spann terminated him after first demoting him to branch

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personal knowledge of the events surrounding plaintiff's discharge); Swanson v. General Services Administration, 110 F.3d 1180, 1190 (5th Cir. 1997)(affirming the exclusion of testimony from witnesses who did not work in plaintiff's office where their anecdotal accounts of discrimination were based on speculation.); Schrand v. Federal Pacific Electric Co., 851 F.2d 152, 156 (6th Cir. 1988)(finding that testimony from former employees who worked in different offices from plaintiff and under different supervisors was irrelevant to plaintiff's age discrimination claim).

manager. The stated reasons for Davis's termination – a "lack of chemistry" and a failure to meet production quotas – were different from the explanation behind Waldrop's discharge – rude and abusive conduct toward staff and customers. The only link between Davis and Waldrop was the role of Joe Phillips in their respective terminations, but this alone hardly furnishes a probative guide to Waldrop's experience with United Companies. It would be particularly odd to view Phillip's role as incriminating the Lending Company since he, too, testified for Waldrop that he was a victim of age discrimination.

Phillips was as dissimilar to Waldrop as Davis was, making his testimony equally irrelevant. He held a different job, regional vice-president, and he reported to a different supervisor, Roger Clark. Witnesses Garold Cooke and Floyd Desormeaux were likewise dissimilar to Waldrop. Cooke, who reported to Phillips, was an area supervisor of seven branch offices in the Lending Company, and Desormeaux was a vice-president of the Lending Company. Although all these witnesses seem to have been similarly situated among themselves as senior managers with United Companies, nothing about their experiences connected with Waldrop. They held different jobs than Waldrop, executed different duties, and were accountable to different supervisors. We have excluded such testimony in the past as irrelevant in supporting a "pattern or practice" claim, and we must do so again here. See Mooney, 54 F.3d at 1221.[3]

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[3] For the same reasons, we find that the court abused its discretion when, during closing argument, it allowed counsel for Wyvill and Waldrop to recite the names of forty-four former

By admitting this evidence, the district court substantially prejudiced United Companies, forcing it to respond to each witness's claims, and creating, in effect, several "trials within a trial." See Mooney, 54 F.3d at 1220-1221 (quoting the district court's opinion that anecdotal testimony forced the defendant to litigate more than the claims actually set for trial). As we have seen, these mini-trials were not probative on the issue of whether Waldrop or Wyvill faced discrimination. See Sims v. Mulcahy, 902 F.2d 524, 531 (7th Cir. 1990)(holding that the introduction of alleged discriminatory acts with no relation to the discrimination claimed by the plaintiff creates "mini-trial" with no probative value).

The prejudice worked by this testimony was all the greater because of the mini-trials' effectiveness. As noted above, the anecdotal witnesses all held similar senior level positions with the Lending Company and could be said to have been similarly situated to one another. In addition to contending that they had suffered from age discrimination, the witnesses claimed personal knowledge of the events surrounding each other's terminations. Their testimony would have been relevant if they had been plaintiffs, but they were not, and the fact that these witnesses made each other's

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employees and to claim that these employees were victims of discrimination by United Companies. There was no evidence that these employees were similarly situated to Wyvill and Waldrop, and there was indeed no evidence, beyond counsel's naked assertion, that these employees had been discriminated against.

case so well distracted attention from the fact that they had little to say about Wyvill's and Waldrop's terminations.[4]

Given the plaintiffs' inability to offer any direct evidence of age discrimination, this parade of anecdotal witnesses, each recounting his own, entirely unrelated contention of age discrimination at the hands of the defendant, substantially prejudiced United Companies. This evidence should have been excluded, and we hold that the district court abused its discretions in not doing so.

2. Age-Based Comments

Plaintiffs also relied on several age-related comments made by United Companies CEO Terrell Brown, Sr. as proof that age-bias motivated the terminations here. Former employee Jim Davis testified that "[Brown, Sr.] felt that...the world had passed [some of the older employees] by, that [the older employees] were just too old to get the job done, and that we should either find another position for them or terminate them." Former employee Joe Phillips testified that "in the early nineties, [Brown, Sr.] told me that he wanted the company to be mean and lean, and he wanted to go to a young, aggressive group of people." Phillips further testified that Brown, Sr. generally wanted to "get rid of the people that were [currently employed at United Companies] so that we can make more money, be more aggressive, more productive." Former employee Garold Cooke testified that

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[4] In fact, Davis, Cooke, and Desormeaux all testified that they had no personal knowledge of the circumstances surrounding the terminations of Wyvill and Waldrop.

Brown Sr. "wished [the older men in corporate headquarters] would go away so that [Brown, Sr.] could get some new blood in the company."

Assuming, as plaintiffs allege, that Brown, Sr. was one of the decision-makers in the terminations of Wyvill and Waldrop, his "stray remarks" are insufficient to create an inference of age discrimination.[5] See, e.g., Waggoner v. City of Garland, 987 F.2d 1160, 1166 (5th Cir. 1993); Turner v. North American Rubber, Inc., 979 F.2d 55, 59 (5th Cir. 1992). In order for an age-based comment to be probative of an employer's discriminatory intent, it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was a determinative factor in the decision to terminate the employee. Equal Employment Opportunity Commission v. Texas Instruments, Inc., 100 F.3d 1173, 1181 (5th Cir. 1996), citing Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 958 (5th Cir. 1993). Brown's remarks do not satisfy this test. They are neither direct and unambiguous, nor were they tied to a time frame relevant to this case. These remarks were not probative on the ultimate question of age discrimination against Waldrop and Wyvill.

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[5] Former employee Garold Cooke alleged that his supervisor, Mark McKinney, repeatedly made age-related comments evidencing age-bias. But there is no evidence that McKinney was a decision-maker with regard to the terminations of Wyvill and Waldrop, and his attitude toward age is therefore irrelevant to plaintiffs' claims. See Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 10 (1st Cir. 1990)("The biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case.").

3. Disparate Treatment Claim

In addition to anecdotal evidence concerning other employees, Waldrop argued that he was treated more harshly than a similarly-placed younger employee. Waldrop contrasted his fate with that of Dwayne Burks, an area supervisor in North Carolina until 1996, who was also guilty of abusive and rude conduct to staff and employees but did not lose his job as a result. To establish a claim of disparate treatment, Waldrop must show that United Companies gave preferential treatment to a younger employee under "nearly identical" circumstances. Little v. Republic Refining Co., Ltd., 924 F.2d 93, 97 (5th Cir. 1991), citing Smith v. Wal-Mart Stores, 891 F.2d 1177, 1180 (5th Cir. 1990)(per curiam). Waldrop did show that Burks was younger (he was in his thirties), that Burks was abusive and rude to United Companies employees, and that there was significant employee turnover in the offices supervised by Burks. He also proved that Burks was demoted rather than fired for his misconduct.

But the striking differences between the two men's situations more than account for the different treatment they received. To begin with, Burks held a different job than Waldrop. Burks's employment problems also differed from Waldrop's. Though he was similarly abusive to his staff, he did not antagonize his immediate superior as Waldrop did. Most importantly, the decision-makers who disciplined Waldrop differed from those who were charged with deciding what action to take against Burks. Waldrop was terminated by Spann and Phillips, while the decision to demote Burks was taken by the current president of the Lending Company, G. G. Hargon, in 1996. As a final point, there is even

evidence that Waldrop was treated better than Burks. Waldrop was given several chances to correct his behavior, including a paid leave of absence, after which he was allowed to return to his manager position. Burks, however, was never given the opportunity to return to his supervisor's position after his demotion. The circumstances surrounding the disciplining of Burks and Waldrop thus fell short of "nearly identical," and reasonable jurors could not have justifiably believed otherwise.

4. Building a File

To show that United Companies' stated reasons for firing them were false, Wyvill and Waldrop alleged that United Companies management ordered supervisors to "build a file" on older workers. According to the plaintiffs, these files, documenting an employee's misdeeds and shortcomings, were used as a fig-leaf to cover any illegal employment actions taken against the employee. As proof that such files were "built" -- that is, created to provide cover for age-motivated terminations and not in the regular course of business -- plaintiffs alleged that United Companies supervisors violated their own standard employee disciplinary procedures in order to make sure the files contained as much damaging information as possible.

Assuming that United Companies did not follow standard procedures in compiling disciplinary records on Wyvill and Waldrop, this Court has previously observed that

> [p]roof that an employer did not follow correct or standard procedures in the termination or demotion of an employee may well serve as

> the basis for a wrongful discharge action under state law. As we have stated, however, the ADEA was not created to redress wrongful discharge simply because the terminated worker was over the age of forty. A discharge may well be unfair or even unlawful and yet not be evidence of age bias under the ADEA. To make out an ADEA claim, the plaintiff must establish some nexus between the employment actions taken by the employer and the employee's age. [A] bald assertion that one exists . . . simply will not suffice.

Moore v. Eli Lilly & Co., 990 F.2d 812, 819 (5th Cir. 1993), citing Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1508 n. 6 (5th Cir. 1988). Here, plaintiffs put forth no evidence that would create a nexus between United Companies's file-building and the plaintiffs' ages. There was no evidence, for example, that United Companies kept files only on older workers, or that it complied with standard disciplinary procedures when filing reports on younger workers but flouted them when it came to Wyvill and Waldrop. Nor was there evidence that United Companies faithfully recorded the disciplinary violations of younger workers but fabricated those which, according to United Companies, motivated the terminations of Wyvill and Waldrop. The act of maintaining disciplinary files on employees, without more, is not illegal under the ADEA. In the absence of any nexus between plaintiffs' allegation of file-building and their ages, such assertions are insufficient to create an inference that plaintiffs were fired on account of age.

5. Additional Evidence of Age Discrimination

The remaining evidence introduced by plaintiffs might have been sufficient to cast doubt on United Companies' proffered explanations for plaintiffs' discharges, but it did nothing to raise an inference that the real reasons for the discharges were related to age. Plaintiffs put on extensive evidence that they were well-qualified for their respective jobs and that they had achieved considerable success. Waldrop introduced testimony that Brantley, his supervisor, was difficult to work for and largely to blame for his employment problems. Wyvill introduced evidence that he was put up to his unauthorized phone calls by the CEO's son, Terrell Brown, Jr. But even assuming the truth of these allegations, they allow at best an inference that United Companies' proffered explanations for the discharges were false. This evidence notably fails to connect the plaintiffs' discharges to the their ages, and it therefore does not permit an inference that age was a motivating factor in the terminations.

In sum, neither Wyvill nor Waldrop produced sufficient evidence to allow a reasonable jury to infer that United Companies terminated them because of age. In Weisgram v. Marley Co., - - U.S. - -, 120 S.Ct. 1011 (2000), the Supreme Court affirmed the authority of courts of appeals to direct the entry of judgment as a matter of law in cases where, once erroneously admitted evidence is removed from consideration, there remains insufficient evidence to support the jury's verdict. Weisgram, 120 S.Ct. at 1022. Accordingly, finding that the properly admitted evidence in this case was insufficient to support the jury's verdict in favor of plaintiffs, we vacate the district court's judgment and

remand for entry of judgment in favor of United Companies.

III. CONCLUSION

For the foregoing reasons, the district court's judgment is VACATED and REMANDED for the entry of judgment as a matter of law in favor of United Companies.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

[Filed February 10, 1998]

No. 94-365 C/W
94-828

J. R. RIDGLEY WYVILL)
Plaintiff,)
)
v.)
)
UNITED COMPANIES LIFE)
INSURANCE COMPANY,)
ET AL.)
Defendants,)

MINUTE ENTRY
DUVAL, J.
FEBRUARY 3, 1998

Before the court are two motions filed by defendants United Companies Life Insurance Company, *et al.*: (1) A Motion for Sanctions, originally set for hearing on April 30, 1997, and reset for hearing on September 3, 1997, and (2) a Motion for Judgment as a Matter of Law or, in the alternative, for a New Trial and to Amend Judgment, also set for hearing on September 3, 1997. Both motions were

submitted for consideration without oral argument. Having reviewed the record and the applicable law, the court denies the motion for sanctions and grants in part the motion for amendment of judgment with respect to the award of prejudgment interest on plaintiffs' backpay awards and denies the motion for judgment as a matter of law, or in the alternative, for new trial or amendment of judgment in all other respects.

I. Background

Plaintiffs Gerald Waldrop ("Waldrop") and Ridgely Wyvill ("Wyvill") each brought claims against their former employers alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 ("ADEA"). Wyvill was formerly employed by United Companies Life Insurance Company and Wyvill was formerly employed by United Mortgage of Georgia which was merged with United Companies Lending Corporation, which two corporations along with their parent company, United Companies Financial Corporation, are defendants in this law suit (collectively "Defendants" or "United Companies"). Waldrop was terminated from his job on January 19, 1993; Wyvill was terminated from his job on February 1, 1993. Defendants denied that age was a determinative factor in the decision to terminate either Wyvill or Waldrop. Defendants maintained that they fired Waldrop for abusive conduct and that they fired Wyvill for having made disruptive phone calls. Defendants also asserted defenses to limit backpay awards.

Several aspects of the procedural history of this case are relevant. The court declared a mistrial four days into the first trial in October 1996 and retried the case in June 1997.

On October 31, 1996, the court entered a mistrial after plaintiffs' counsel made allegations of ethical misconduct against their former co-counsel, James Holliday ("Holliday"). After the second trial, a jury rendered a verdict in favor of plaintiffs on June 30, 1997 based on their findings that Defendants had willfully violated the ADEA in terminating Wyvill and Waldrop from their jobs. The jury awarded Waldrop backpay in the amount of seventy-six thousand, five hundred sixty nine dollars ($76,569), and awarded Wyvill backpay in the amount of one hundred eighty-six, nine hundred thirty-nine dollars ($186,939).[1] The court awarded statutory liquidated damages to each plaintiff and awarded Wyvill frontpay in the amount of twenty thousand dollars ($20,000).

II. Motion for Sanctions

Defendants urge the court to sanction plaintiffs' counsel, pursuant to title 28, United States Code, section 1927, for their allegedly having caused the mistrial entered on

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[1] The jury charges contained a stipulation by the parties as to the full amount of backpay, which is the amount the jury awarded on the verdict form. The jury was further instructed,

> Pursuant to the stipulation, you are instructed that the amount of backpay as to each plaintiff is established for the period commencing at the date of termination until the date of trial, unless Defendants can establish that this period should be limited.

Jury Charges, p. 15.

October 31, 1996. Defendants urge that the court award them their costs incurred in connection with the October 28, 1996 trial, including attorney fees. On the morning of October 31, 1997, plaintiffs' counsel Donald Stewart ("Stewart"), Gary Cody ("Cody") and Susan Wall Griffin ("Griffin") requested to meet with the court *in camera* to raise concerns regarding possible ethical misconduct on the part of their co-counsel, James Holliday. In a sealed proceeding that morning, Stewart, Cody and Griffin stated their allegations on the record and Holliday and defense counsel responded. Per Minute entry of November 13, 1997, the Court referred the allegations of ethical misconduct to the honorable John V. Parker, Chief Judge of the Middle District of Louisiana. As their central allegation, Stewart, Cody and Griffin alleged that Holliday purposely caused the mistrial of this case by misplacing evidence, failing to share information regarding a potential witness, failing to prepare a witness for direct examination, and causing or counseling witnesses to testify in violation of the court's orders. Defendants emphasize that Holliday had no motive to cause a mistrial or sabotage his clients or co-counsel, especially in view of the amount of time and expenses that he had invested in the case. Defendants point out that Holliday was not confronted with any of these allegations by his co-counsel before they brought them to the attention of the court and argue that plaintiffs' counsel were feeling positive about their cases, rather than disappointed, after the third day of trial. Defendants assert that counsel simply "disagreed about trial strategy," and that United Companies should not be required to foot the bill of a mistrial caused by plaintiffs' counsel.

The court finds that none of plaintiffs' counsel acted recklessly, in bad faith, or with improper motive in

connection with the mistrial of this case.[2] FDIC v. Conner, 20 D.3d 1376, 1384-85 (5th Cir., 1994), citing Hogue v. Royce City, 939 F.2d 1249, 1256 (5th Cir., 1991) (application of § 1927 requires evidence of recklessness, bad faith or improper motive). On October 31, 1996, Stewart, Cody and Griffin conveyed that they felt it their ethical duty to reveal the alleged misconduct to the court. To the court's knowledge, the three had no motive to cause a mistrial. The allegations were serious and very upsetting to the accusers as well as the accused. A melodramatic flavor permeated the courtroom that morning; the allegations may have been overblown, or even unfounded, and it is possible, had cooler heads prevailed, that plaintiffs' counsel could have worked through their differences and avoided this confrontation altogether. This being said, the court is of the firm belief that plaintiffs' counsel did not act with improper motive, in bad faith or recklessly by bringing their concerns to the attention of the court. Once Stewart, Cody and Griffin mentioned their concerns, the court insisted that they state their allegations on the record and the court firmly believed that plaintiffs Wyvill and Waldrop could not receive a fair trial under the circumstances. While also regretting the amount of resources exhausted in obtaining a jury verdict in this case, the court

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[2] Section 1927 provides:

> Any attorney. . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Sec. 28 U.S.C. § 1927.

finds that plaintiffs' counsel did not vexatiously cause a mistrial. The court concludes that Defendants' Motion for Sanctions shall be denied.

III. Motion for Judgment as a Matter of Law

a. Standard under Rule 50(b)

Under Rule 50 of the Federal Rules of Civil Procedure, the court must determine whether there is sufficient evidence to support the jury's verdict and in so doing all evidentiary issues are to be resolved in favor of the successful party and that party is to be given the benefit of all reasonable inferences.

As stated in the seminal case Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969), in considering a motion for judgment as a matter of law, the court:

> should consider all of the evidence–not just that evidence which supports the non-mover's case–but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could arrive at a contrary verdict, granting of the motion is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, the evidence of such quality and wight that reasonable and fair-minded men in exercise of impartial

> judgment might reach different conclusions, the motion should be denied . . . .

See Branch v. Chevron Int'l Oil Co., 681 F.2d 426, 428-29 (5th Cir. 1982). In an age discrimination case, a plaintiff can avoid judgment as a matter of law if circumstantial evidence of discrimination, taken as a whole, (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer, and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. See Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1995).

b. Evidence supports verdict for willful age discrimination and backpay

The jury was instructed with respect to each plaintiff's claim that its job was to determine whether age was a determinative factor in Defendants' decision to terminate him.[3] Defendants do not challenge the correctness of the jury

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[3] The jury was instructed:

> It is unlawful for an employer to discharge an employee over the age of forty (40) because of that employee's age.
>
> To succeed in his claim, the plaintiff must prove by a preponderance of the evidence:
> (1) that he was over the age of forty (40);
> (2) that he was discharged;
> (3) that he was qualified for his position; and
> (4) that age was one of the reasons Defendants discharged him.

instructions; rather they contend that the evidence was legally insufficient to support the verdict. In their motion, Defendants articulate a different test for discrimination than the instruction read to the jury in this case and assert that Plaintiffs were, "unable to prove that similarly situated younger employees failed to perform their duties in a satisfactory manner and were not terminated." See Armendariz v. Pinkerton Tobacco Co., 58 F.3d 144, 149 (5th Cir. 1995). This assertion mischaracterizes the presentation of each plaintiff's case and the instructions to the jury, which, as stated, required that each Plaintiff prove that age was a determinative factor in his termination.

Having presided over this trial, the court firmly believes that taking all the evidence in the light and with all reasonable inferences most favorable to plaintiffs, there is sufficient evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might reach different conclusions. The jury listened attentively to more than five days of testimony and completed special interrogatories in rendering its verdict. The court hereby incorporates and reiterates its reasons for denying United Companies' motion for judgment as a matter of law at trial. The court reviews the key evidence that the jury evaluated reaching its verdict.

In this case it is undisputed that the plaintiff was over forty, was qualified for his position and was discharged from his employment at United Companies. Thus, the element in dispute is whether Defendants discharged the plaintiff because of his age or regarded his age as a determinative factor in its consideration. Jury instructions, pp. 10-11.

United Companies purportedly terminated Wyvill for having made disruptive phone calls at work. A reasonable jury could have concluded, based on the evidence adduced at trial, however, that this explanation for his termination was pretextual and manufactured by United Companies to conceal that it terminated Wyvill because of his age. The disruptive phone calls included calls to Carl Scott and Sandy Stafford, both employees of Defendants. Wyvill testified that he phoned Carl Scott upon the suggestion of Tee Brown, the son of Terrell Brown, Sr., the CEO of United Companies, who was working as an intern at United Companies Life Insurance Company at the time. Tee Brown admitted that, in a conversation with Wyvill, he had made a passing reference to a situation in the Tennessee office that was reported in the underground company newspaper called the "Unlink," but denied ever having asked Wyvill to investigate the matter. Wyvill testified that he phoned Carl Scott, a Tennessee office employee, made notes of his conversation and passed them onto Tee Brown. Carl Scott testified that Wyvill called him "out of the blue," informed him that Waldrop had been terminated by saying, "They got the Chief," and told Scott to "watch his backside." Carl Scott complained about the phone call from Wyvill and United Companies investigated the calls.

Wyvill twice called Sandy Stafford with whom he discussed the termination of Waldrop. Stafford had previously served as assistant branch manager to Waldrop and was being considered to replace Waldrop. Although Stafford claimed that Wyvill told her that accepting the branch manager position would be like taking "blood money," she testified that she took the position anyway. In his testimony, Wyvill denied using the term "blood money."

Wyvill was terminated at a group meeting on February 1, 1993. At that meeting held that day, Wyvill was given the opportunity to explain the calls, he testified that he never mentioned Tee Brown's involvement in the calls out of loyalty to Tee Brown. Wyvill was terminated at that meeting and left the company that day. He was paid a sum of $5,000 after his termination. Prior to his termination, Wyvill had received positive reviews from his supervisors. Defendants claimed that Wyvill's position was eliminated after his termination upon the merger of United Company Life Insurance with United Companies Lending Company. Wyvill offered evidence that he was "replaced" by a younger employee, Margaret Moon. Moon testified that she took over supervisory duties that previously had been Wyvill's responsibility.

United Companies purportedly terminated Waldrop for his abusive treatment of employees and customers. Waldrop was manager of United Companies' branch office located in Dalton, Georgia. Waldrop supervised a number of employees, including Sandy Stafford, Pam McMillan, Cheryl Welch and Pat Little. Waldrop was supervised by D. C. Brantley and Joe Phillips. Under his management, Waldrop's office had an exemplary record of performance and low employee turnover. Waldrop's employees-Stafford, McMillan, Welch and Little- testified that he used foul language in the office and could be temperamental. Welch and McMillan wrote letters to the company to complain about Waldrop's behavior. Three former customers-Donna Hooper, Brenda Burgess and Kim David-testified that Waldrop used foul language in discussing their accounts. Granted, based on the testimony of these witnesses, there was

an evidentiary basis upon which a reasonably minded jury could have found in favor of Defendants on this claim.

On the other hand, however, D.C. Brantley testified that he had never had a conversation with any of Waldrop's staff complaining that Waldrop was verbally abusive or used inappropriate language. Brantley also stated that he had no idea that Waldrop was being fired for such conduct. Waldrop took a sixty day leave of absence from his work in May 1991. There was contradictory testimony as to the reason for the absence. Prior to obtaining leave. Waldrop met with his two supervisors, Phillips and Brantley, and Bill Spann, United Companies' Human Resources representative. Of the four persons at that meeting, only Spann recalls that Waldrop's abusive conduct was a reason for him being put on leave. Phillips, Brantley and Waldrop all recalled that Waldrop was taking leave for health reasons; Waldrop's file states that he took a leave of absence for health reasons; and Waldrop's employees, Stafford and McMillan, also understood that Waldrop took leave for health reasons. Waldrop further contended that United Companies did not fire another employee, Dwayne Burks, for comparative behavior.

The jury heard damning testimony from Joe Phillips, Gerald Cooke, and Jim Davis, all former employees of United Companies, who testified that Terrell Brown instituted a policy of ridding United Companies of its older employees. Jim Davis and Joe Phillips each testified that he heard this policy spoken by Terrell Brown firsthand. Joe Phillips testified that he and Bill Spann discussed a plan to carry out Terrell Brown's policy. From this testimony, the jury could have concluded that Wyvill and Waldrop were terminated as a result of an age-based policy emanating from top

management. Moreover, there was evidence that a number of middle management employees over the age of forty had been terminated during the relevant time period.

Finally, Defendants offered defenses in effort to limit any backpay award to Waldrop or Wyvill. Defendants attempted to prove that they had discovered evidence that Wyvill had solicited a false appraisal prior to his discharge for which he would have been terminated; they argued that an award of backpay should be limited to the date they discovered the information about the false appraisal. With respect to Wyvill, Defendants argued that his award of backpay, if any, should be limited to the date when he would have been discharged because of a subsequent reduction in force at the company or, alternatively, to the date Wyvill was terminated from subsequent employment at the Louisiana Department of Economic Development. Plaintiffs attempted to discredit this evidence cross-examination and testimony from each plaintiff.

In sum, there was a sound evidentiary basis supporting each plaintiff's claim for willful discrimination. A reasonable jury could have concluded that Terrell Brown desired to rid United Companies of its older employees based on the testimony of a number of older, former employees. A reasonable jury could have concluded that Wyvill's transgressions were too minor to form the basis of a termination, especially in light of his positive reviews. A reasonable jury could have concluded that Waldrop's difficult personality was not the genuine reason for his termination, when considered in view of the other evidence relating to his job performance and his leave of absence. In sum, the jury could have believed that Defendants concocted reasons for

terminating these two individuals in order to disguise an age-based discriminatory motive. Finally, the jury had an evidentiary basis to reject Defendants backpay defenses. The jury could have concluded that a false appraisal was insufficient basis upon which to terminate Waldrop in light of company practice and his outstanding performance record as well as other mitigating factors. And the jury could have rejected the explanation that Wyvill was slated to be terminated, because, if true, there would have been even less reason to fire Wyvill discriminatorily, if he was going to be laid off soon anyway. Finally, the jury could have refused to limit Wyvill's backpay based on the fact that he was terminated from his job at the Louisiana Department of Economic Development based on testimony that Wyvill was ill-suited to that position because he lacked the requisite skills and experience.

IV. Motion for New Trial or Amendment of Judgment

a. Standard under Rule 59

The standard provided under Rule 59 of the Federal Rules of Civil Procedure to determine whether a new trial or remittitur is required is different from that of Rule 50. The rule does not specify what grounds are necessary to support such a decision; however, case law demonstrates that a new trial may be granted if the district court finds that the verdict is against the great weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course. Smith v. Transworld Drilling, 773 F.2d 610, 613 (5th Cir. 1985). In making its determination, the lodestar is whether the verdict is against the great weight of the evidence or would result in the

miscarriage of justice. Unlike a Rule 50 motion, there is no need to view the evidence in the light most favorable to the nonmoving party. C. Wright & A. Miller, Federal Practice and Procedure, § 2806 (2d ed. 1995). Based on the evidence introduced at trial and outlined above, the court finds that the verdict was not against the great of the evidence.

The court stands by its evidentiary rulings as contained in the record. Further, the court stands by its order consolidating these cases for pretrial and trial purposes pursuant to Rule 42(a) of the Federal Rules of Civil Procedure. Fed. R. Civ. Proc. 41(a).

b. The award of prejudgment interest on back pay amounts was erroneous

The court concedes that it erred in awarding prejudgment interest on plaintiffs' awards of backpay. United Companies correctly directs the court to the Fifth Circuit's decision in McCann v. Texas City Refining, Inc., 984 F.2d 667, 673 (5th Cir. 1993), in which it specifically adopted an approach to prejudgment interest in ADEA cases. The court stated,

> In an ADEA case where liquidated damages are awarded, a court may not award prejudgment interest on either the backpay or the liquidated damage award.

Id. Thus, in the Fifth Circuit, liquidated damages replace prejudgment interest. See Downey v. Comm'r. Of Internal Revenue, 33 F.3d 836, 839 (7th Cir. 1994). Plaintiffs cite no authority to the contrary. Accordingly, the court shall issue

an amended judgment to remove the award of prejudgment interest on the awards of backpay to plaintiffs.

Accordingly, for the reasons stated,

IT IS ORDERED that the **Motion for Sanctions** filed by defendants, United Companies Financial Corporation, et al., is hereby **DENIED**.

IT IS FURTHER ORDERED that the **Motion for Judgment as a Matter of Law or, in the alternative, for a New Trial and to Amend Judgment** filed by defendants, United Companies Financial Corporation, et al., is **GRANTED in part**, to amend the judgment so as to remove the award of prejudgment interest on plaintiffs' awards of backpay, and **DENIED in all other respects.**

/s/ Stanwood R. Duval, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

[Filed February 10, 1998]

No. 94-365 C/W
94-828

J. R. RIDGLEY WYVILL
Plaintiff,

v.

UNITED COMPANIES LIFE INSURANCE COMPANY, ET AL.
Defendants,

AMENDED JUDGMENT

This action came on for jury trial before the Court in Baton Rouge, Louisiana, the Honorable Stanwood R. Duval, Jr., presiding, and the claims against defendants, United Companies Life Insurance Company, et al., having been duly tried and a verdict having been duly rendered,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of plaintiff Gerald Waldrop, and against defendants, United Companies Life Insurance Company, et al., in the amount of $149,658.00, plus legal interest from the date of judgment pursuant to federal law, plus costs and attorney fees.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of plaintiff Ridgely Wyvill, and against defendants, United Companies Life Insurance Company, et al., in the amount of $393,878.00, plus legal interest from the date of judgment pursuant to federal law, plus costs and attorney fees.

The proper amount of costs to be awarded shall be determined by the Clerk of Court pursuant to U.L.L.R. 5.04. The proper amount of attorney fees to be awarded shall be determined by the magistrate judge pursuant to 28 U.S.C. § 636 (b)(1)(B).

New Orleans, Louisiana, the 3rd day of February, 1998.

/s/ Stanwood R. Duval, Jr.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed August 21, 2000]

No. 98-30287

J. R. RIDGLEY WYVILL
Plaintiff/Appellee/
Cross-Appellant,

v.

UNITED COMPANIES LIFE INSURANCE COMPANY, UNITED COMPANIES FINANCIAL CORPORATION
Defendants/Appellants/
Cross-Appellees,

UNITED COMPANIES LENDING CORPORATION
Appellant/Cross-Appellee.

GERALD W. WALDROP
Plaintiff/Appellee/
Cross-Appellant,

v.

UNITED COMPANIES FINANCIAL CORPORATION, UNITED COMPANIES MORTGAGE OF GEORGIA *Defendants/Appellants/ Cross-Appellees,*	)
UNITED COMPANIES LENDING CORPORATION *Appellant/Cross-Appellee.*	)

Appeal from the United States District Court for the Middle District of Louisiana

ON PETITION FOR REHEARING EN BANC

Before JONES, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition* for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

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* Judge Dennis would grant panel rehearing based on Reeves v. Sanderson Plumbing Products Co., ____ U.S. ___, 120 S.Ct. 2097 (June 12, 2000)

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having noted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____
Edith H. Jones
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Dated June 28, 2000]

No. 98-30287

J.R. RIDGLEY WYVILL and GERALD W. WALDROP, *Plaintiffs-Appellees-Cross-Appellants*,	)
v.	)
UNITED COMPANIES LIFE INSURANCE COMPANY, et al., *Defendants-Appellants-Cross-Appellees.*	)

On Appeal from the United States District Court
for the Middle District of Louisiana

Brief of the Equal Employment Opportunity Commission
as Amicus Curiae in Support of Petition for
Rehearing En Banc

C. GREGORY STEWART
General Counsel

PHILIP B. SKLOVER
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FED. R. APP. P. 35(b)(1) STATEMENT

Pursuant to Fed. R. App. P. 35(b)(1)(A), I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States, and that consideration by the full Court is therefore necessary to secure and maintain uniformity of decisions in this Court:

Reeves v. Sanderson Plumbing Products, Inc., 2000 WL 743663 (June 12, 2000).

Dori K. Bernstein
Attorney
Equal Employment Opportunity Commission

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC") is the federal agency charged with interpreting and enforcing the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., and other federal laws barring employment discrimination. As a United States government agency, the EEOC is authorized to file an amicus curiae brief "without the consent of the parties or leave of court." Fed. R. App. P. 29(a).

In these consolidated ADEA suits, a panel of this Court reversed the jury's verdict holding United Companies[1] liable for willful age discrimination in firing Gerald Waldrop and Ridgley Wyvill. See Wyvill v. United Companies Life Insurance Co., 2000 WL 621305 (5th Cir., May 31, 2000). In ruling that the evidence was insufficient to support the verdict, the panel applied the same flawed analysis that the Supreme Court has since unanimously disapproved in Reeves v. Sanderson Plumbing Products, Inc., 2000 WL 743663 (June 12, 2000). The Supreme Court in Reeves clarified the nature of proof required to sustain a jury's finding of age discrimination, and the standard of review under Fed. R. Civ. P. 50 for judgment as a matter of law. Because the full Court's application of this recent Supreme Court precedent will have a significant impact on the EEOC's enforcement efforts, we offer our views to the Court.

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[1] Defendants United Companies Financial Corporation, and its subsidiaries United Companies Life Insurance Company and United Companies Lending Corporation, will be collectively referred to as "United Companies."

STATEMENT OF THE ISSUE

Whether plaintiffs' prima facie proof of age discrimination, coupled with evidence discrediting United Companies' proffered explanations for firing them, is sufficient to sustain the jury's verdict of willful age discrimination?

STATEMENT OF FACTS[2]

Ridgley Wyvill and Gerald Waldrop worked as managers for subsidiaries of United Companies. Waldrop was branch manager of United Companies Lending Corporation in Dalton, Georgia from 1983 until he was fired in January 1993, at age 47. Wyvill was hired by United Companies in 1978, and managed the credit life department of United Companies Life Insurance Company in Baton Rouge, Louisiana from 1980 until his dismissal in February 1993, at age 53. See Wyvill v. United Companies Life Insurance Co., 2000 WL 621305, *1-*3 (5th Cir., May 31, 2000). Waldrop was replaced by assistant manager Sandy Stafford, who was under 40. T.Vol.I, p114. Wyvill's supervisory duties were assumed by his younger assistant, Margaret Moon, then 33 years old. See T.Vol.II, p242.

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[2] The EEOC has not had an opportunity to review the full trial record. This factual statement is based primarily on the panel opinion and the district court's decision denying United Companies' post-trial motion for judgment as a matter of law. See Record Excerpts of Appellants ("RE"), Exhibit ("Ex.") I.

Wyvill and Waldrop sued United Companies, claiming they were discharged because of age in violation of the ADEA. United Companies denied that age was a factor in either termination, and asserted that Waldrop was fired for abusive treatment of employees and customers, and Wyvill was fired because he had made disruptive phone calls. See RE, Ex.I, p2. At trial, Waldrop and Wyvill sought to discredit the proffered reasons for their terminations, and presented "extensive evidence that they were well-qualified for their respective jobs and that they had achieved considerable success" at United Companies. Wyvill, at *9.

According to Wyvill, the phone calls that purportedly led to his discharge were made at the behest of Tee Brown, Jr., son of Terrell Brown, Sr., the CEO of United Companies. See id. at *2. Wyvill testified that Tee Brown asked him to investigate an underground company newspaper (the "Unlink"), which was critical of management. Wyvill's testimony was corroborated to some extent by the testimony of Tee Brown, who "admitted that, in a conversation with Wyvill, he had made a passing reference to a situation in the Tennessee office that was reported in the . . . 'Unlink,' but denied ever having asked Wyvill to investigate the matter." RE, Ex.I, p7. Following his conversation with Tee Brown about the "Unlink," Wyvill called Carl Scott, branch manager of United Companies' Nashville office, and Sandy Stafford, Waldrop's assistant manager. Id., pp7-8; Wyvill, at *2.

Scott and Stafford complained to upper management about the calls. Senior managers learned from office telephone records that Wyvill had also called several disgruntled former employees. Id. at *2-*3. Management met with Wyvill on February 1, 1993, and asked for an explanation. Wyvill

testified that, out of loyalty to Tee Brown, he did not mention to his superiors Brown's request to investigate the "Unlink." Wyvill was fired on the spot, ending 15 years of previously successful employment with United Companies. Id. at *3; RE, Ex.I, p8.

Prior to his discharge, Wyvill had received positive performance evaluations from his supervisors. Id. Wyvill presented evidence that following his termination, CEO Brown, Sr. discovered that his son had induced Wyvill to make the calls, and paid Wyvill $5,000 to "leave quietly." Wyvill, at *3; RE, Ex.I, p8. Although United Companies asserted that Wyvill's position was eliminated shortly after he was fired, Wyvill's evidence showed that his former assistant, twenty years his junior, effectively replaced him. Id.

With respect to Waldrop, who was purportedly fired for abusive conduct, United Companies presented the testimony of employees and customers who described Waldrop's foul language and temperamental personality. Four employees who worked under Waldrop's supervision (Stafford, Pam McMilllan, Cheryl Welch, and Pat Little) testified that he "used foul language in the office and could be temperamental," and Welch and McMillan cited his behavior in post-resignation letters. RE, Ex.I, p8. Three former customers testified that Waldrop "used foul language in discussing their accounts." Id. There was also evidence that Waldrop had a long-running contentious relationship with his immediate supervisor, D.C. Brantley, and that Brantley had complained to management of Waldrop's insubordination. See Wyvill, at *1-*2.

Although such conduct and complaints certainly could have furnished ample justification to fire Waldrop, other evidence indicated that Waldrop's foul language and difficult personality were not the true reasons for his discharge. See RE, Ex.I, pp8-9. Under Waldrop's management, his "office had an exemplary record of performance and low employee turnover." Id., p8. In fact, Waldrop was often called upon to train new employees, and "several of his assistant branch managers became successful managers of their own branches." Wyvill, at *2. Waldrop and "his branch were consistently among the top ten performers in the Lending Company, in terms of quantity and profitability of the loans produced." Id.

D.C. Brantley, Waldrop's immediate supervisor, testified that none of Waldrop's staff had ever complained to him about Waldrop's verbal abuse or inappropriate language, and "he had no idea that Waldrop was being fired for such conduct." RE, Ex.I, p8. Furthermore, two of the employees who complained of Waldrop's mistreatment at trial (Stafford and McMillan) visited him at home after his discharge, "Stafford to ask for his blessing in succeeding him as branch manager, and McMillan to show him her grandchild." Wyvill, at *2. According to Waldrop, "these visits were not the actions of employees afraid of or antagonized by an abusive and rude boss." Id. Waldrop also provided evidence that United Companies did not fire Dwayne Burks, a branch manager in his thirties, who was "abusive and rude" to his subordinates and had "significant employee turnover" in the offices he supervised. Id. at *7.

Conflicting evidence about a six-week paid leave of absence Wyvill took in 1991 cast further doubt on the veracity

of United Companies' proffered explanation for his discharge. Waldrop maintained that he required medical leave to treat health problems associated with diabetes. Id. at *1. Waldrop's personnel file corroborates that he took leave for health reasons. RE, Ex.I, p9. Both the two supervisors who approved the leave (Brantley and Joe Phillips), and the employees Waldrop supervised (Stafford and McMillan), likewise recalled that the six-week paid leave was health-related and not a disciplinary action. See id. Only Bill Spann, United Companies' Human Resources ("HR") Representative, testified in support of the company's contention that "the leave was necessitated by Waldrop's problems in the office and with his supervisor." Wyvill, at *1; see RE, Ex.I, p9.

In addition to the evidence tending to discredit United Companies' proffered explanations for firing Wyvill and Waldrop, three former managers (Joe Phillips, Gerald Cooke, and Jim Davis) provided "damning testimony" that CEO Terrell Brown "instituted a policy of ridding United Companies of its older employees." Id. Davis testified that Brown, Sr "'felt that . . . the world had passed [some of the older employees] by, that [the older employees] were just too old to get the job done, and that we should either find another position for them or terminate them.'" Wyvill, at *7. Phillips testified that in the early 1990s, Brown, Sr. "'told me that he wanted the company to be mean and lean, and he wanted to go to a young, aggressive group of people,'" and that Brown, Sr. "generally wanted to 'get rid of the people that were [currently employed at United Companies] so that we can make more money, be more aggressive, more productive.'" Id. According to Cooke, Brown, Sr. "wished [the older men in corporate headquarters] would go away so

that [Brown, Sr.] could get some new blood in the company." Id.

Phillips further testified that "he and [HR Representative] Bill Spann discussed a plan to carry out Terrell Brown's policy." RE, Ex.I, p9. Both Spann and Phillips were directly involved in the decisions to fire Wyvill and Waldrop, as well as the terminations of other former employees who presented anecdotal evidence of age discrimination. See Wyvill, at *2 (Spann and Phillips "decided to terminate Waldrop"); id. at *3 (Phillips and Spann participated in firing Wyvill at February 1, 1993 meeting); id. at *5-*6 (noting Spann's and Phillips' involvement in terminations of other older managers). Evidence that "a number of middle management employees over the age of forty had been terminated during the relevant time period" supported plaintiffs' theory that "Wyvill and Waldrop were terminated as a result of an age-based policy emanating from top management." RE, Ex.I, pp9-10.

At the close of evidence, the district court denied United Companies' motion for judgment as a matter of law and submitted the case to the jury. See id., p7. The court instructed the jury that in order to prevail, each plaintiff was required to prove that "age was a determinative factor in [United Companies'] decision to terminate him." See id., p6 and n.3. The jury found that United Companies had willfully discriminated against Waldrop and Wyvill because of age, and awarded backpay. Wyvill, at *3.

The district court denied United Companies' renewed motion for judgment as a matter of law. Upon review of the "key evidence that the jury evaluated reaching its verdict," see

RE, Ex.I, pp7-10, the court concluded that "there was a sound evidentiary basis supporting each plaintiff's claim for willful discrimination." Id., p10. Viewing the evidence most favorably to Waldrop and Wyvill, as required under Fed. R. Civ. P. 50, see id., pp5-6, the court stated:

> A reasonable jury could have concluded that Terrell Brown desired to rid United Companies of its older employees based on the testimony of a number of older, former employees. A reasonable jury could have concluded that Wyvill's transgressions were too minor to form the basis of a termination, especially in light of his positive reviews. A reasonable jury could have concluded that Waldrop's difficult personality was not the genuine reason for his termination, when considered in view of the other evidence relating to his job performance and his leave of absence. In sum, the jury could have believed that Defendants concocted reasons for terminating these two individuals in order to disguise an age-based discriminatory motive.

Id. The court entered judgment on the verdict, and awarded liquidated damages, front pay (to Wyvill), interest, and attorneys' fees. See Wyvill, at *3.

PANEL OPINION

A panel of this Court reversed the jury's verdict and held that United Companies was entitled to judgment as a matter of law. Wyvill, at *9. In deciding the "critical issue"

of "whether Waldrop and Wyvill produced sufficient evidence that United Companies' explanation for their discharges was merely a pretext for age discrimination," the panel acknowledged that "plaintiffs' evidence may have cast doubt on the proffered explanations for their firing or on the soundness of the company's business decision," but held such evidence "insufficient to show that the real reason was age discrimination." Id. at *4. The panel rejected plaintiffs' other evidence as irrelevant, insufficiently probative, or unduly prejudicial, and concluded that "[s]horn of this . . . irrelevant evidence, the judgment cannot stand." Id. at *1.

In the panel's view, the district court had abused its discretion in admitting "anecdotal testimony from and about other employees" who were terminated by United Companies under circumstances suggesting a pattern of age discrimination because these individuals "held different jobs than [Waldrop or Wyvill], executed different duties, and were accountable to different supervisors," and their "unrelated contention[s] of age discrimination . . . substantially prejudiced United Companies. Id. at *5-*6. The panel held that United Companies' more favorable treatment of Dwayne Burks, the younger supervisor whose abusive treatment of his employees was comparable to the conduct for which Waldrop was supposedly fired, was not evidence of age discrimination because the circumstances surrounding Burks and Waldrop were not "nearly identical." Id. at *7. In the panel's view, evidence that "United Companies supervisors violated their own standard employee disciplinary procedures" in an effort to "`build a file' on older workers," which was then "used as a fig-leaf to cover any illegal employment actions," was irrelevant absent "any nexus between plaintiffs' allegation of file-building and their ages." Id.

The panel also discounted the probative value of testimony by three former managers (Phillips, Davis, and Cooke) that CEO Terrell Brown, Sr. had indicated on several occasions that he favored replacing older employees with a younger workforce. Despite evidence that Brown, Sr., as well as Phillips, had participated in the decisions to terminate Waldrop and Wyvill, the panel characterized his comments as "stray remarks" that were "insufficient to create an inference of age discrimination." Id. at *7. "In order for an age-based comment to be probative of an employer's discriminatory intent," the panel ruled, "it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was a determinative factor in the decision to terminate the employee." Id.

Finally, the panel concluded, "[t]he remaining evidence introduced by plaintiffs might have been sufficient to cast doubt on United Companies' proffered explanations for plaintiffs' discharges, but it did nothing to raise an inference that the real reasons for the discharges were related to age. . . . [E]ven assuming the truth of [plaintiffs'] allegations, they allow at best an inference that United Companies' proffered explanations for the discharges were false." Id. at *9. The panel further reasoned that "[t]his evidence notably fails to connect the plaintiffs' discharges to their ages, and it therefore does not permit an inference that age was a motivating factor in the terminations." Id.

ARGUMENT

THE PLAINTIFFS' PRIMA FACIE CASE, COUPLED WITH EVIDENCE DISCREDITING UNITED COMPANIES' PROFFERED EXPLANATIONS FOR FIRING THEM, IS SUFFICIENT TO SUSTAIN THE JURY'S VERDICT OF AGE DISCRIMINATION.

Less than two weeks after the panel issued its opinion in this case, the Supreme Court, in a unanimous decision, clarified the nature of proof required to sustain a jury's finding of age discrimination, and the standard of review under Fed. R. Civ. P. 50 for granting judgment as a matter of law. Reeves v. Sanderson Plumbing Products, Inc., 2000 WL 743663 (June 12, 2000). The Supreme Court in Reeves held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification" for a challenged employment action "is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Id. at *9. A panel of this Court, the Supreme Court ruled, had incorrectly "proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination," and thus "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." Id. at *8.

Contrary to this Court's reasoning, the Supreme Court recognized that "[p]roof that the defendant's explanation" for a challenged employment action "is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." Id. at *9. Consistent with general principles of evidence law, the trier of fact in "appropriate circumstances . . . can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." Id. "[O]nce the employer's justification has been eliminated," the Court explained, "discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." Id. "[B]ecause a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability," the Supreme Court reasoned, "the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." Id. at *10.

The Supreme Court further held that in reversing the jury's verdict, this Court had "misapplied the standard of review" for judgment as a matter of law under Fed. R. Civ. P. 50; "disregarded critical evidence favorable to [Reeves] – namely, the evidence supporting [his] prima facie case and undermining [his employer's] nondiscriminatory explanation"; improperly "failed to draw all reasonable inferences in favor of [Reeves]"; and "impermissibly substituted its judgment concerning the weight of the evidence for the jury's." Id. at *12. The Supreme Court concluded that because Reeves had "established a prima facie case of discrimination, introduced enough evidence for the jury to reject [Sanderson's] explanation, and produced additional evidence of age-based

animus, there was sufficient evidence for the jury to find that [Sanderson] had intentionally discriminated."[3] Id. at *13. The case was therefore properly submitted to the jury, and this Court had "erred in overturning its verdict." Id.

The Supreme Court in Reeves thus unanimously reaffirmed the probative value of circumstantial evidence in proving intentional discrimination, the critical role of the jury in deciding whether such evidence demonstrates unlawful discrimination, and the limited nature of judicial review under Rule 50 in assessing evidentiary sufficiency. The panel's decision in this case is premised on the same erroneous legal analysis and improper standard of review that led a unanimous Supreme Court to reverse in Reeves. In this case, as in Reeves, a panel of this Court held that evidence casting doubt on the veracity of an employer's explanation for a challenged discharge, together with evidence supporting a prima facie case, was insufficient to support a reasonable inference that the firing was impermissibly motivated by age.[4] In each case,

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[3] To support his claim of age discrimination, Reeves presented evidence that Sanderson's asserted reason for firing him – alleged inaccuracies in timekeeping records of employees under Reeves' supervision – were pretextual, see Reeves, at *6-*7, and that a manager who recommended Reeves' termination (and who was married to the company president) had treated Reeves worse than a younger supervisor, subjected him to increased scrutiny and harsher discipline, and directed age-related insults at him two months before his discharge. Id. at *12.

[4] Compare Wyvill, at *4 ("while plaintiffs' evidence may have cast doubt on the proffered explanations for their firing or on the soundness of the company's business decision, it was

moreover, the panel, based on its own view of the evidence, reversed a jury verdict of willful age discrimination and ruled that the employer was entitled to judgment as a matter of law. Given the similarity in the legal analysis, standard of evidentiary review, and result reached by this Court in both Reeves and Wyvill, the Supreme Court's unanimous reversal in Reeves requires this Court to vacate the panel opinion and reinstate the judgment sustaining the jury's verdict.

Wyvill and Waldrop each presented a prima facie case of age discrimination: Both men were in the statutorily protected age group (Wyvill was 53; Waldrop was 47) when they were fired; both presented "extensive evidence that they were well-qualified for their respective jobs and that they had achieved considerable success," Wyvill, at *9; and each presented evidence that he was replaced by a significantly younger employee. See Reeves, at *5 (summarizing prima facie evidence); see also O'Connor v. Consolidated Coin

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insufficient to show that the real reason was age discrimination"); id. at *9 (evidence "might have been sufficient to cast doubt on United Companies' proffered explanations for plaintiffs' discharges, but it did nothing to raise an inference that the real reasons for the discharges were related to age"; evidence "allow[s] at best an inference that United Companies' proffered explanations for the discharges were false" but "notably fails to connect the plaintiffs' discharges to their ages and it therefore does not permit an inference that age was a motivating factor in the terminations"), with Reeves, at *4 (Court of Appeals "acknowledged that [Reeves] 'very well may' have offered sufficient evidence for 'a reasonable jury [to] have found that [Sanderson's] explanation for its employment decision was pretextual," but nonetheless held evidence insufficient to sustain finding of age discrimination).

Caterers Corp., 517 U.S. 308, 313 (1996) (evidence that "replacement is substantially younger than the plaintiff" is a "reliable indicator of age discrimination"). As the panel (and the trial court) recognized, Wyvill and Waldrop also presented evidence "sufficient to cast doubt on United Companies' proffered explanations for [their] discharges" and to "allow . . . an inference that United Companies' proffered explanations for the discharges were false." Wyvill, at *9; see also RE, Ex.I, pp7-8 (summarizing evidence from which reasonable jury could have concluded that "explanation for [Wyvill's] termination was pretextual and manufactured by United Companies to conceal that it terminated [him] because of his age"); id., pp9-10 (evidence of Waldrop's performance and conflicting accounts concerning leave of absence would permit reasonable jury to conclude "that Waldrop's difficult personality was not the genuine reason for his termination"). Yet the panel held that this evidence "did nothing to raise an inference that the real reasons for the discharges were related to age." Wyvill, at *9.

The decision in Reeves establishes that the panel's holding is manifestly incorrect. Under the Supreme Court's ruling, "[p]roof that [United Companies'] explanation [for firing Waldrop and Wyvill] is unworthy of credence . . . is probative of intentional discrimination, and it may be quite persuasive." Reeves, at *9. As the Supreme Court recognized, "once [United Companies'] justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since [United Companies] is in the best position to put forth the actual reason for its decision[s]." Id. The jury was properly instructed that in order to prevail, Wyvill and Waldrop were required to show that age was a determinative factor in their terminations, see

Hazen Paper v. Biggins, 507 U.S. 604, 610 (1993), and reached a verdict of willful age discrimination on both claims. The verdicts of willful age discrimination thus suggests that the jury found the pretext evidence "quite persuasive," and elected to draw an inference that the law plainly allows.

In evaluating the sufficiency of the evidence to support these verdicts, the panel was required to "draw all reasonable inferences in favor of [Waldrop and Wyvill]," and was not entitled to "make credibility determinations or weigh the evidence." Reeves, at *11. As in Reeves, the panel in this case "disregarded critical evidence favorable to [Waldrop and Wyvill] -- namely, the evidence supporting [their] prima facie case and undermining [United Companies'] nondiscriminatory explanation," improperly "failed to draw all reasonable inferences in favor of [Wyvill and Waldrop]," and thus "misapplied the standard of review dictated by Rule 50." Id. at *12.

In rejecting each category of evidence Waldrop and Wyvill offered to demonstrate age discrimination, moreover, the panel impermissibly weighed the evidence and effectively denied them any opportunity to prove discrimination circumstantially. The Supreme Court has consistently made clear that a plaintiff seeking to demonstrate unlawful discrimination "is not limited to presenting evidence of a certain type," because proof of pretext "may take a variety of forms." Patterson v. McLean Credit Union, 491 U.S. 164, 187 (1989). "Especially relevant to such a showing" is evidence that the rule or criterion cited by the employer to explain its decision was applied in a discriminatory manner. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). "Other evidence that may be relevant to any showing

of pretext includes facts as to the [employer's] treatment of [the plaintiff] during his . . . term of employment," id., including discriminatory remarks or instances of harassment or abuse by individuals responsible for the challenged employment decision. See Patterson, 491 U.S. at 188; see also U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711, 713-14 n.2 (1983) (citing "numerous derogatory comments about blacks in general and Aikens in particular" as evidence that would support finding of race discrimination). Proof of the employer's "general policy and practice" with respect to employment of older individuals (in an ADEA case), including statistical evidence, "may be helpful" in demonstrating pretext, but statistics "may not be in and of themselves controlling as to an individualized [employment] decision." McDonnell Douglas, 411 U.S. at 804-05 & n.19; see also Furnco Construction Corp. v. Waters, 438 U.S. 567, 579-80 (1978) (statistical proof of racially balanced work force "is not wholly irrelevant on the issue of intent," but cannot "conclusively demonstrate" absence of discriminatory motive). Evidence challenging the factual accuracy of the proffered explanation, such as proof that the employer "misjudged the qualifications" of competing candidates or was otherwise mistaken in its decision, also "may be probative of whether the employer's reasons are pretexts for discrimination." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981).

The evidence rejected by the panel as "irrelevant" or not "probative" of age discrimination falls squarely into the categories approved by the Supreme Court. The "anecdotal evidence" of discrimination offered by other older managers, and the testimony recounting CEO Brown's remarks regarding older employees, is probative of United Companies'

"general policy and practice" with respect to older workers. See McDonnell Douglas, 411 U.S. at 804-05. Brown's comments are also probative of discriminatory bias on the part of an individual with ultimate authority to establish company personnel policy, and who participated in the termination decisions. See Aikens, 460 U.S. at 713-14 n.2. Waldrop's evidence that a younger branch manager who was similarly abusive to employees was disciplined less harshly demonstrates discriminatory application of the very criterion cited to explain his discharge, and is thus "[e]specially relevant" to show pretext. See McDonnell Douglas, 411 U.S. at 804.

Finally, while "there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory," Reeves, at *9, the Supreme Court's illustrative examples clearly indicate such cases will be rare: "For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." Id. Neither the district court nor the panel identified any "other, nondiscriminatory reason" for firing Waldrop or Wyvill that was even suggested, let alone "conclusively revealed," by the trial record. Nor did the record contain "uncontroverted independent evidence that no discrimination had occurred." Id. To the contrary, the anecdotal evidence that other older managers were subjected to discriminatory treatment, and the remarks made by CEO

Terrell Brown, Sr., strongly suggest, as the jury found, that discrimination had occurred.

CONCLUSION

Because the evidence was clearly sufficient to support the jury's finding that United Companies willfully discriminated against Wyvill and Waldrop because of age, the EEOC urges the full Court to vacate the panel opinion and reinstate the judgment entered on the jury verdict.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 4,828 words. See Fed. R. App. P. 29(d). The brief was prepared using the WordPerfect 8 word-processing

system, in 14-point proportionally spaced type for text and 12-point type for footnotes. See Fed. R. App. P. 32(a)(5); Fifth Cir. Rule 32.1.

DORI K. BERNSTEIN

June 28, 2000

CERTIFICATE OF SERVICE

I, Dori K. Bernstein, certify that two copies of this Brief and a copy of the brief on a computer diskette were mailed, first class, postage prepaid, on this 28th day of June, to the following counsel of record:

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APPENDIX E

SUPREME COURT OF THE UNITED STATES

[Decided June 12, 2000]

No. 99-536

Roger REEVES,
Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.

Argued March 21, 2000.

Decided June 12, 2000.

O'CONNOR, J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion.

Justice O'CONNOR delivered the opinion of the Court.

This case concerns the kind and amount of evidence necessary to sustain a jury's verdict that an employer unlawfully discriminated on the basis of age. Specifically, we must resolve whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence

for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action. We must also decide whether the employer was entitled to judgment as a matter of law under the particular circumstances presented here.

I

In October 1995, petitioner Roger Reeves was 57 years old and had spent 40 years in the employ of respondent, Sanderson Plumbing Products, Inc., a manufacturer of toilet seats and covers. 197 F.3d 688, 690 (C.A.5 1999). Petitioner worked in a department known as the "Hinge Room," where he supervised the "regular line." *Ibid.* Joe Oswalt, in his mid-thirties, supervised the Hinge Room's "special line," and Russell Caldwell, the manager of the Hinge Room and age 45, supervised both petitioner and Oswalt. *Ibid.* Petitioner's responsibilities included recording the attendance and hours of those under his supervision, and reviewing a weekly report that listed the hours worked by each employee. 3 Record 38-40.

In the summer of 1995, Caldwell informed Powe Chesnut, the director of manufacturing and the husband of company president Sandra Sanderson, that "production was down" in the Hinge Room because employees were often absent and were "coming in late and leaving early." 4 *id.*, at 203-204. Because the monthly attendance reports did not indicate a problem, Chesnut ordered an audit of the Hinge Room's timesheets for July, August, and September of that year. 197 F.3d, at 690. According to Chesnut's testimony, that investigation revealed "numerous timekeeping errors and misrepresentations on the part of Caldwell, Reeves, and

Oswalt." *Ibid.* Following the audit, Chesnut, along with Dana Jester, vice president of human resources, and Tom Whitaker, vice president of operations, recommended to company president Sanderson that petitioner and Caldwell be fired. *Id.*, at 690-691. In October 1995, Sanderson followed the recommendation and discharged both petitioner and Caldwell. *Id.*, at 691.

In June 1996, petitioner filed suit in the United States District Court for the Northern District of Mississippi, contending that he had been fired because of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* At trial, respondent contended that it had fired petitioner due to his failure to maintain accurate attendance records, while petitioner attempted to demonstrate that respondent's explanation was pretext for age discrimination. 197 F.3d, at 692-693. Petitioner introduced evidence that he had accurately recorded the attendance and hours of the employees under his supervision, and that Chesnut, whom Oswalt described as wielding "absolute power" within the company, 3 Record 80, had demonstrated age-based animus in his dealings with petitioner. 197 F.3d, at 693.

During the trial, the District Court twice denied oral motions by respondent for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure, and the case went to the jury. 3 Record 183; 4 *id.*, at 354. The court instructed the jury that "[i]f the plaintiff fails to prove age was a determinative or motivating factor in the decision to terminate him, then your verdict shall be for the defendant." Tr. 7 (Jury Charge) (Sept. 12, 1997). So charged, the jury returned a verdict in favor of petitioner, awarding him

$35,000 in compensatory damages, and found that respondent's age discrimination had been "willfu[l]." 197 F.3d, at 691. The District Court accordingly entered judgment for petitioner in the amount of $70,000, which included $35,000 in liquidated damages based on the jury's finding of willfulness. *Ibid.* Respondent then renewed its motion for judgment as a matter of law and alternatively moved for a new trial, while petitioner moved for front pay. 2 Record, Doc. Nos. 36, 38. The District Court denied respondent's motions and granted petitioner's, awarding him $28,490.80 in front pay for two years' lost income. 2 *id.*, Doc. Nos. 40, 41.

The Court of Appeals for the Fifth Circuit reversed, holding that petitioner had not introduced sufficient evidence to sustain the jury's finding of unlawful discrimination. 197 F.3d, at 694. After noting respondent's proffered justification for petitioner's discharge, the court acknowledged that petitioner "very well may" have offered sufficient evidence for "a reasonable jury [to] have found that [respondent's] explanation for its employment decision was pretextual." *Id.*, at 693. The court explained, however, that this was "not dispositive" of the ultimate issue--namely, "whether Reeves presented sufficient evidence that his age motivated [respondent's] employment decision." *Ibid.* Addressing this question, the court weighed petitioner's additional evidence of discrimination against other circumstances surrounding his discharge. *See id.*, at 693-694. Specifically, the court noted that Chesnut's age-based comments "were not made in the direct context of Reeves's termination"; there was no allegation that the two other individuals who had recommended that petitioner be fired (Jester and Whitaker) were motivated by age; two of the decisionmakers involved

in petitioner's discharge (Jester and Sanderson) were over the age of 50; all three of the Hinge Room supervisors were accused of inaccurate recordkeeping; and several of respondent's management positions were filled by persons over age 50 when petitioner was fired. *Id.*, at 693-694. On this basis, the court concluded that petitioner had not introduced sufficient evidence for a rational jury to conclude that he had been discharged because of his age. *Id.*, at 694.

We granted certiorari, 528 U.S. 985, 120 S.Ct. 444, 145 L.Ed.2d 361 (1999), to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination. *Compare Kline v. TVA*, 128 F.3d 337 (C.A.6 1997) (prima facie case combined with sufficient evidence to disbelieve employer's explanation always creates jury issue of whether employer intentionally discriminated); *Combs v. Plantation Patterns*, 106 F.3d 1519 (C.A.11 1997) (same), *cert. denied*, 522 U.S. 1045, 118 S.Ct. 685, 139 L.Ed.2d 632 (1998); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (C.A.3 1996) (same) (*en banc*), *cert. denied*, 521 U.S. 1129, 117 S.Ct. 2532, 138 L.Ed.2d 1031 (1997); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104(CA8) (same), *cert. denied*, 513 U.S. 946, 115 S.Ct. 355, 130 L.Ed.2d 310 (1994); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (C.A.7 1994) (same); *Washington v. Garrett*, 10 F.3d 1421 (C.A.9 1993) (same), *with Aka v. Washington Hospital Center*, 156 F.3d 1284 (C.A.D.C.1998) (*en banc*) (plaintiff's discrediting of

employer's explanation is entitled to considerable weight, such that plaintiff should not be routinely required to submit evidence over and above proof of pretext), *and with Fisher v. Vassar College*, 114 F.3d 1332 (C.A.2 1997) (*en banc*) (plaintiff must introduce sufficient evidence for jury to find both that employer's reason was false and that real reason was discrimination), *cert. denied*, 522 U.S. 1075, 118 S.Ct. 851, 139 L.Ed.2d 752 (1998); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (C.A.5 1996) (same); *Theard v. Glaxo, Inc.*, 47 F.3d 676 (C.A.4 1995) (same); *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (C.A.1 1994) (same).

II

Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). When a plaintiff alleges disparate treatment, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). That is, the plaintiff's age must have "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome." *Ibid.* Recognizing that "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), the Courts of Appeals, including the Fifth Circuit in this case, have employed some

variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims that are based principally on circumstantial evidence. *See, e.g., Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420, 429 (C.A.4 2000); *Galabya v. New York City Bd. of Ed.*, 202 F.3d 636, 639 (C.A.2 2000); *Hall v. Giant Food, Inc.*, 175 F.3d 1074, 1077-1078 (C.A.D.C.1999); *Beaird v. Seagate Technology Inc.*, 145 F.3d 1159, 1165 (C.A.10), *cert. denied*, 525 U.S. 1054, 119 S.Ct. 617, 142 L.Ed.2d 556 (1998); *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990-991 (C.A.8 1998); *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (C.A.11), *cert. denied*, 525 U.S. 962, 119 S.Ct. 405, 142 L.Ed.2d 329 (1998); *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (C.A.3 1997) (*en banc*); *Kaniff v. Allstate Ins. Co.*, 121 F.3d 258, 263 (C.A.7 1997); *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 456-457 (C.A.9 1995); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 957 (C.A.5 1993); *Mesnick v. General Elec. Co.*, 950 F.2d 816, 823 (C.A.1 1991), *cert. denied*, 504 U.S. 985, 112 S.Ct. 2965, 119 L.Ed.2d 586 (1992); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 69 (C.A.6 1982). This Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1), also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here. *Cf. O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996).

McDonnell Douglas and subsequent decisions have "established an allocation of the burden of production and an

order for the presentation of proof in . . . discriminatory-treatment cases." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). First, the plaintiff must establish a prima facie case of discrimination. *Ibid.*; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). It is undisputed that petitioner satisfied this burden here: (i) at the time he was fired, he was a member of the class protected by the ADEA ("individuals who are at least 40 years of age," 29 U.S.C. § 631(a)), (ii) he was otherwise qualified for the position of Hinge Room supervisor, (iii) he was discharged by respondent, and (iv) respondent successively hired three persons in their thirties to fill petitioner's position. *See* 197 F.3d, at 691-692. The burden therefore shifted to respondent to "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Burdine, supra*, at 254, 101 S.Ct. 1089. This burden is one of production, not persuasion; it "can involve no credibility assessment." *St. Mary's Honor Center, supra*, at 509, 113 S.Ct. 2742. Respondent met this burden by offering admissible evidence sufficient for the trier of fact to conclude that petitioner was fired because of his failure to maintain accurate attendance records. *See* 197 F.3d, at 692. Accordingly, "the *McDonnell Douglas* framework--with its presumptions and burdens"--disappeared, *St. Mary's Honor Center, supra*, at 510, 113 S.Ct. 2742, and the sole remaining issue was "discrimination vel non," *Aikens, supra*, at 714, 103 S.Ct. 1478.

Although intermediate evidentiary burdens shift back and forth under this framework, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the

plaintiff." *Burdine*, 450 U.S., at 253, 101 S.Ct. 1089. And in attempting to satisfy this burden, the plaintiff--once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision--must be afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Ibid.*; *see also St. Mary's Honor Center, supra*, at 507-508, 113 S.Ct. 2742. That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Burdine, supra*, at 256, 101 S.Ct. 1089. Moreover, although the presumption of discrimination "drops out of the picture" once the defendant meets its burden of production, *St. Mary's Honor Center, supra*, at 511, 113 S.Ct. 2742, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual," *Burdine, supra*, at 255, n. 10, 101 S.Ct. 1089.

In this case, the evidence supporting respondent's explanation for petitioner's discharge consisted primarily of testimony by Chesnut and Sanderson and documentation of petitioner's alleged "shoddy record keeping." 197 F.3d, at 692. Chesnut testified that a 1993 audit of Hinge Room operations revealed "a very lax assembly line" where employees were not adhering to general work rules. 4 Record 197-199. As a result of that audit, petitioner was placed on 90 days' probation for unsatisfactory performance. 197 F.3d, at 690. In 1995, Chesnut ordered another investigation of the Hinge Room, which, according to his testimony, revealed that petitioner was not correctly recording the absences and hours

of employees. 4 Record 204-205. Respondent introduced summaries of that investigation documenting several attendance violations by 12 employees under petitioner's supervision, and noting that each should have been disciplined in some manner. *See* App. 21-24, 30-37; 4 Record 206-208. Chesnut testified that this failure to discipline absent and late employees is "extremely important when you are dealing with a union" because uneven enforcement across departments would keep the company "in grievance and arbitration cases, which are costly, all the time." 4 *id.*, at 206. He and Sanderson also stated that petitioner's errors, by failing to adjust for hours not worked, cost the company overpaid wages. 3 *id.*, at 100, 142, 154; 4 *id.*, at 191-192, 213. Sanderson testified that she accepted the recommendation to discharge petitioner because he had "intentionally falsif[ied] company pay records." 3 *id.*, at 100.

Petitioner, however, made a substantial showing that respondent's explanation was false. First, petitioner offered evidence that he had properly maintained the attendance records. Most of the timekeeping errors cited by respondent involved employees who were not marked late but who were recorded as having arrived at the plant at 7 a.m. for the 7 a.m. shift. 3 *id.*, at 118-123; 4 *id.*, at 240-247, 283-285, 291, 293-294. Respondent contended that employees arriving at 7 a.m. could not have been at their workstations by 7 a.m., and therefore must have been late. 3 *id.*, at 119- 120; 4 *id.*, at 241, 245. But both petitioner and Oswalt testified that the company's automated timeclock often failed to scan employees' timecards, so that the timesheets would not record any time of arrival. 3 *id.*, at 6, 85; 4 *id.*, at 334-335. On these occasions, petitioner and Oswalt would visually check the workstations and record whether the employees were

present at the start of the shift. 3 *id.*, at 6, 85-87; 4 *id.*, at 335. They stated that if an employee arrived promptly but the timesheet contained no time of arrival, they would reconcile the two by marking "7 a.m." as the employee's arrival time, even if the employee actually arrived at the plant earlier. *Ibid.* On cross-examination, Chesnut acknowledged that the timeclock sometimes malfunctioned, and that if "people were there at their work station[s]" at the start of the shift, the supervisor "would write in seven o'clock." 4 *id.*, at 244. Petitioner also testified that when employees arrived before or stayed after their shifts, he would assign them additional work so they would not be overpaid. *See* 197 F.3d, at 693.

Petitioner similarly cast doubt on whether he was responsible for any failure to discipline late and absent employees. Petitioner testified that his job only included reviewing the daily and weekly attendance reports, and that disciplinary writeups were based on the monthly reports, which were reviewed by Caldwell. 3 Record 20-22; 4 *id.*, at 335. Sanderson admitted that Caldwell, and not petitioner, was responsible for citing employees for violations of the company's attendance policy. 3 *id.*, at 20-21, 137-138. Further, Chesnut conceded that there had never been a union grievance or employee complaint arising from petitioner's recordkeeping, and that the company had never calculated the amount of overpayments allegedly attributable to petitioner's errors. 4 *id.*, at 267, 301. Petitioner also testified that, on the day he was fired, Chesnut said that his discharge was due to his failure to report as absent one employee, Gina Mae Coley, on two days in September 1995. 3 *id.*, at 23, 70; 4 *id.*, at 335-336. But petitioner explained that he had spent those days in the hospital, and that Caldwell was therefore responsible for any overpayment of Coley. 3 *id.*, at 17, 22.

Finally, petitioner stated that on previous occasions that employees were paid for hours they had not worked, the company had simply adjusted those employees' next paychecks to correct the errors. 3 *id.*, at 72-73.

Based on this evidence, the Court of Appeals concluded that petitioner "very well may be correct" that "a reasonable jury could have found that [respondent's] explanation for its employment decision was pretextual." 197 F.3d, at 693. Nonetheless, the court held that this showing, standing alone, was insufficient to sustain the jury's finding of liability: "We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated [respondent's] employment decision." *Ibid.* And in making this determination, the Court of Appeals ignored the evidence supporting petitioner's prima facie case and challenging respondent's explanation for its decision. *See id.*, at 693-694. The court confined its review of evidence favoring petitioner to that evidence showing that Chesnut had directed derogatory, age-based comments at petitioner, and that Chesnut had singled out petitioner for harsher treatment than younger employees. *See ibid.* It is therefore apparent that the court believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand. That is, the Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination.

In so reasoning, the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to

prove intentional discrimination through indirect evidence. This much is evident from our decision in *St. Mary's Honor Center*. There we held that the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not compel judgment for the plaintiff. 509 U.S., at 511, 113 S.Ct. 2742. The ultimate question is whether the employer intentionally discriminated, and proof that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct." *Id.*, at 524, 113 S.Ct. 2742. In other words, "[i]t is not enough . . . to dis believe the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Id.*, at 519, 113 S.Ct. 2742.

In reaching this conclusion, however, we reasoned that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated:

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Id.*, at 511, 113 S.Ct. 2742.

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is

probative of intentional discrimination, and it may be quite persuasive. *See id.*, at 517, 113 S.Ct. 2742 ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992); *see also Wilson v. United States*, 162 U.S. 613, 620-621, 16 S.Ct. 895, 40 L.Ed. 1090 (1896); 2 J. Wigmore, Evidence § 278(2), p. 133 (J. Chadbourn *rev. ed.*1979). Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *Cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with some reason, based his decision on an impermissible consideration"). Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff

has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. *See Aka v. Washington Hospital Center*, 156 F.3d, at 1291-1292; *see also Fisher v. Vassar College*, 114 F.3d, at 1338 ("[I]f the circumstances show that the defendant gave the false explanation to conceal something other than discrimination, the inference of discrimination will be weak or nonexistent"). To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not "'treat discrimination differently from other ultimate questions of fact.'" *St. Mary's Honor Center, supra*, at 524, 113 S.Ct. 2742 (quoting *Aikens*, 460 U.S., at 716, 103 S.Ct. 1478).

Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. *See infra*, at 2110. For purposes of this case, we need not--and could not--resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law. It suffices to say that, because a prima facie case and sufficient evidence to

reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.

III

A

The remaining question is whether, despite the Court of Appeals' misconception of petitioner's evidentiary burden, respondent was nonetheless entitled to judgment as a matter of law. Under Rule 50, a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. Rule Civ. Proc. 50(a); *see also Weisgram v. Marley Co.*, 528 U.S. 440, ----, ----, 120 S.Ct. 1011, 1016-1018, 145 L.Ed.2d 958 (2000). The Courts of Appeals have articulated differing formulations as to what evidence a court is to consider in ruling on a Rule 50 motion. *See Venture Technology, Inc. v. National Fuel Gas Distribution Corp.*, decided with *Schwimmer v. Sony Corp. of America*, 459 U.S. 1007, 1009, 103 S.Ct. 362, 74 L.Ed.2d 398 (1982) (WHITE, J., dissenting from denial of *certiorari*). Some decisions have stated that review is limited to that evidence favorable to the non-moving party, *see, e.g., Aparicio v. Norfolk & Western R. Co.*, 84 F.3d 803, 807 (C.A.6 1996); *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 566 (C.A.8 1967), while most have held that review extends to the entire record, drawing all reasonable inferences in favor of the nonmovant, *see, e.g., Tate v. Government Employees Ins. Co.*, 997 F.2d 1433, 1436

(C.A.11 1993); *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (C.A.5 1969) (*en banc*).

On closer examination, this conflict seems more semantic than real. Those decisions holding that review under Rule 50 should be limited to evidence favorable to the nonmovant appear to have their genesis in *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497 (1949). *See* 9A C. Wright & A. Miller, Federal Practice and Procedure § 2529, pp. 297-301 (2d ed.1995) (hereinafter Wright & Miller). In *Wilkerson*, we stated that "in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of" the nonmoving party. 336 U.S., at 57, 69 S.Ct. 413. But subsequent decisions have clarified that this passage was referring to the evidence to which the trial court should give credence, not the evidence that the court should review. In the analogous context of summary judgment under Rule 56, we have stated that the court must review the record "taken as a whole." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). And the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.

In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990); *Liberty Lobby, Inc., supra*, at 254, 106 S.Ct. 2505; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, n. 6, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Liberty Lobby, supra*, at 255, 106 S.Ct. 2505. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. *See* Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.*, at 300.

B

Applying this standard here, it is apparent that respondent was not entitled to judgment as a matter of law. In this case, in addition to establishing a prima facie case of discrimination and creating a jury issue as to the falsity of the employer's explanation, petitioner introduced additional evidence that Chesnut was motivated by age-based animus and was principally responsible for petitioner's firing. Petitioner testified that Chesnut had told him that he "was so old [he] must have come over on the Mayflower" and, on one occasion when petitioner was having difficulty starting a machine, that he "was too damn old to do [his] job." 3 Record 26.

According to petitioner, Chesnut would regularly "cuss at me and shake his finger in my face." 3 *id.*, at 26-27. Oswalt, roughly 24 years younger than petitioner, corroborated that there was an "obvious difference" in how Chesnut treated them. 3 *id.*, at 82. He stated that, although he and Chesnut "had [their] differences," "it was nothing compared to the way [Chesnut] treated Roger." *Ibid.* Oswalt explained that Chesnut "tolerated quite a bit" from him even though he "defied" Chesnut "quite often," but that Chesnut treated petitioner "[i]n a manner, as you would . . . treat . . . a child when . . . you're angry with [him]." 3 *id.*, at 82-83. Petitioner also demonstrated that, according to company records, he and Oswalt had nearly identical rates of productivity in 1993. 3 *id.*, at 163-167; 4 *id.*, at 225-226. Yet respondent conducted an efficiency study of only the regular line, supervised by petitioner, and placed only petitioner on probation. 3 *id.*, at 166-167; 4 *id.*, at 229. Chesnut conducted that efficiency study and, after having testified to the contrary on direct examination, acknowledged on cross-examination that he had recommended that petitioner be placed on probation following the study. 4 *id.*, at 197-199, 237.

Further, petitioner introduced evidence that Chesnut was the actual decisionmaker behind his firing. Chesnut was married to Sanderson, who made the formal decision to discharge petitioner. 3 *id.*, at 90, 152. Although Sanderson testified that she fired petitioner because he had "intentionally falsif[ied] company pay records," 3 *id.*, at 100, respondent only introduced evidence concerning the inaccuracy of the records, not their falsification. A 1994 letter authored by Chesnut indicated that he berated other company directors, who were supposedly his co-equals, about how to do their

jobs. Pl. Exh. 7, 3 Record 108-112. Moreover, Oswalt testified that all of respondent's employees feared Chesnut, and that Chesnut had exercised "absolute power" within the company for "[a]s long as [he] can remember." 3 *id.*, at 80.

In holding that the record contained insufficient evidence to sustain the jury's verdict, the Court of Appeals misapplied the standard of review dictated by Rule 50. Again, the court disregarded critical evidence favorable to petitioner--namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation. *See* 197 F.3d, at 693-694. The court also failed to draw all reasonable inferences in favor of petitioner. For instance, while acknowledging "the potentially damning nature" of Chesnut's age-related comments, the court discounted them on the ground that they "were not made in the direct context of Reeves's termination." *Id.*, at 693. And the court discredited petitioner's evidence that Chesnut was the actual decisionmaker by giving weight to the fact that there was "no evidence to suggest that any of the other decision makers were motivated by age." *Id.*, at 694. Moreover, the other evidence on which the court relied--that Caldwell and Oswalt were also cited for poor recordkeeping, and that respondent employed many managers over age 50--although relevant, is certainly not dispositive. *See Furnco*, 438 U.S., at 580, 98 S.Ct. 2943 (evidence that employer's work force was racially balanced, while "not wholly irrelevant," was not "sufficient to conclusively demonstrate that [the employer's] actions were not discriminatorily motivated"). In concluding that these circumstances so overwhelmed the evidence favoring petitioner that no rational trier of fact could have found that petitioner was fired because

of his age, the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's.

The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination. Given the evidence in the record supporting petitioner, we see no reason to subject the parties to an additional round of litigation before the Court of Appeals rather than to resolve the matter here. The District Court plainly informed the jury that petitioner was required to show "by a preponderance of the evidence that his age was a determining and motivating factor in the decision of [respondent] to terminate him." Tr. 7 (Jury Charge) (Sept. 12, 1997). The court instructed the jury that, to show that respondent's explanation was a pretext for discrimination, petitioner had to demonstrate "1, that the stated reasons were not the real reasons for [petitioner's] discharge; and 2, that age discrimination was the real reason for [petitioner's] discharge." *Ibid.* (emphasis added). Given that petitioner established a prima facie case of discrimination, introduced enough evidence for the jury to reject respondent's explanation, and produced additional evidence of age-based animus, there was sufficient evidence for the jury to find that respondent had intentionally discriminated. The District Court was therefore correct to submit the case to the jury, and the Court of Appeals erred in overturning its verdict.

For these reasons, the judgment of the Court of Appeals is reversed.

It is so ordered.

Justice GINSBURG, concurring.

The Court today holds that an employment discrimination plaintiff may survive judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a "prima facie case," as that term is used in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. Because the Court of Appeals in this case plainly, and erroneously, required the plaintiff to offer some evidence beyond those two categories, no broader holding is necessary to support reversal.

I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law. I anticipate that such circumstances will be uncommon. As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. Ante, at 2108. Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation. *Ibid.* Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide; that is the lesson of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). But the inference remains--unless it is conclusively demonstrated, by

evidence the district court is required to credit on a motion for judgment as a matter of law, *see ante*, at 2110-2111, that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above. Because the Court's opinion leaves room for such further elaboration in an appropriate case, I join it in full.

APPENDIX F

EXCERPTS FROM TRANSCRIPT

***

[GERALD WALDROP - RECORD VOLUME I, 113-114]

Q At some point in time, you worked, did you not, for the Defendant, United Companies?

A Yes, I did.

Q You worked there in Dalton?

A Yes, sir, I did.

Q And were you fired by United Companies at some point in time?

A Yes, sir, I was.

Q And when did that occur?

A In January of '93.

Q And at the time you were fired, how old were you?

A Forty-seven.

Q And who replaced you? Who took your place?

A Ms. Stafford.

Q Who?

A Ms. Stafford.

Q Sandy Stafford?

A Yes, sir.

Q Do you know how old Ms. Stafford was at that time?

A She was considerably younger than I was, forty or younger, I would say.

***

[GERALD WALDROP - RECORD VOLUME I, 114]

Q Now, when did you first start to work for them? In '83?

A In '83, yes, sir.

***

[GERALD WALDROP - RECORD VOLUME I, 128-131]

A This is simply a letter we got monthly on profit figures, Judge.

THE COURT: I understand. I just want to know which letters now. You have talked about April and March of '86?

A Basically, these are '86, it looks like here.

Q Those are the months for '86?

A Months of '86, year of '86.

Q 30-B?

A This is through December of '87.

MR. STEWART: Judge, they are not complete each time because he kept the records and provided them to us.

THE COURT: I understand.

BY MR. STEWART:

Q I will ask you to identify 30-C.

A This is the same thing in January of' 87.

Q And then I will show you 30-D.

A This is the same thing in January of '87.

Q And then I will show you 30-E.

A This is the same type documentation, July of '88.

Q And I will show you 30-F.

A This is the same, in February, it looks like, or March of '88.

* * *

Q Behind some of those documents there are other months that are listed?

A Right.

Q They follow in chronological order, do they not, Mr. Waldrop?

A Yes, they do.

Q In those documents that you now have before you, were there rankings given in those documents at a certain place?

A Yes, sir. Yes, sir, there were.

Q Were those rankings based on profitability?

A Yes, sir, they were.

Q Would you tell the ladies and gentlemen of the jury how they calculated the profit of a particular branch for a given month or a given year, Mr. Waldrop?

A Profit was figured after, you know, all expenses came out, employees' salaries, cars, just like any business would be run, taxes. In other words, the figures in here were the net profit figures, everything after taxes, health insurance, anything we might have.

Q So what we are talking about in profitability and how you would compare it to other offices is the net profit that would go to where? The home office of United Companies?

A Yes, sir.

Q And that is what the Dalton Branch made or the Atlanta Branch made?

A Yes, sir.

Q Tell me, if you would, Mr. Waldrop, how you ranked during that period of time?

***

[GERALD WALDROP - RECORD VOLUME I, 131]

A I was always in the top five of the company. I was number one a year or two. Like I said, I started making profit from the day I opened the office, which is very unusual, and continued until I was terminated.

Q Tell me, if you would, Mr. Waldrop, how you ranked during that period of time?

A I was always in the top five of the company. I was number one a year or two. Like I said, I started making profit from the day I opened the office, which is very unusual, and continued until I was terminated.

***

[GERALD WALDROP - RECORD VOLUME I, 134-137]

Q Did you have, during that time frame, anybody, out of all these people youhave mentioned, Mr. Clarke, Mr. Phillips, Mr. Brown, cite you for any particular thing you had done?

A Yes, sir, I did.

Q Who was it and what did they cite you for?

A Well, are you talking about during the meetings?

Q Yes.

A I was always recognized at the meetings by Mr. Brown. He always used me as an example, I guess, for all the employees that was in there, and he was always congratulating me on what I had done and telling the other managers that they should come to me after the meetings and talk to me about how I had

done business and how I got my office established, and just how I done business with people, generally, there. I always, like every meeting we went to, I got some kind of award or golf clubs or a golf bag or shirt or something all the time. I was even invited several times to Baton Rouge to play golf with Mr. Brown, and I was offered promotions through him, also.

Q So you got to meet the President of the company and had the opportunity to come down and play golf with him. Did you receive any correspondence from either him or anybody else during that period of time?

A Yes, sir, I did.

MR. STEWART: May I approach again, Judge?

THE COURT: Yes, sir.

***

[GERALD WALDROP - RECORD VOLUME I, 134-137]
Cont.

BY MR. STEWART:

Q I will show you what has been marked Exhibit 40 for you, Mr. Waldrop, and ask you, if you can, to identify that, please, sir.

A This is a letter from Brian Lorio. He was head of the Life company. He was in the life company in sales. He was congratulating me. It says, "What a month" -
-

Q Cngratulating you for what?

A For writing forty thousand dollars in life premiums in one month, which was very unusual for that small a town, that type of premium, for any office in the company.

Q What is Exhibit 41, please, Mr. Waldrop?

A It is a memo from Mr. Brown, just congratulating me on what a great job I have done and How I started the office and how well I am like by people.

Q What is the date of that?

A July of '85.

Q Well, I will show you Exhibit 42, and ask you to identify that, please sir.

A It is one dated from Mr. Brown in February of '86, congratulating me on an insurance premium month and inviting me to come play golf with him.

Q And what is Exhibit 44? I believe that was 43 that you just talked about.

A This was one in September inviting me to come down here and play golf with him, and also that he was sending one of the L.S. U. grads to my office to be trained, and asked me to work hard with him and show him some good habits and what have you.

***

[GERALD WALDROP - RECORD VOLUME I, 134-137]
Cont. (1)

MR. STEWART: Judge, we would like to offer those into evidence, and if we could publish those to the jury.

THE COURT: Subject to the objections previously urged, let them be admitted.

MR. STEWART: At this time, Judge, we would like to publish an exemplar of this document.

THE COURT: You might tell counsel which one you are using as your exemplar.

MR. STEWART: That is 30-F, and it is dated March 25, 1988. We state that is an exemplar of the documents we introduced.

THE COURT: Under the series of documents 30-A through et cetera.

BY MR. STEWART:

Q Now, you mentioned that in one of those letters Mr. Brown asked you to train some people from L.S.U. Was there anybody else other than the person referred to?

A There was two that came down later. Neil I remember real well because I got to know him very well. He stayed down there for several months with me.

Q Now, did any of your trainees later become managers of the company, Mr. Waldrop?

A Yes, sir. As far as I know, Neil did, and, of course, other people that I had in my office with me.

***

[GERALD WALDROP - RECORD VOLUME I, 144]

Q Now, let me give you back 25 because some of these may not pick up, so I want to make sure we get an accurate number. Let me just ask you, did you get a raise for each of the years you worked for the company, Mr. Waldrop?

A I got a raise every year except for '91.

***

[GERALD WALDROP - RECORD VOLUME I, 146-149]

BY MR. STEWART:

Q Did you have some kind of health problem that you experienced in this time frame, '90 to '91?

A Yes, I did.

Q Can you tell us what that health problem was?

A I have diabetes.

Q When did you learn that you had diabetes, Mr. Waldrop?

A When I was forty years old.

Q And how did you treat it?

A With insulin injections.

Q And did your condition get worse or better in the '90 to '91 period?

A In '91, it got worse.

Q As a result of that, did you have to take a leave of absence?

A Yes, sir.

MR. STEWART: May I approach the witness, Judge?

THE COURT: Yes, you may, sir.

BY MR. STEWART:

Q Let me show you Exhibit 34 and ask you, Mr. Waldrop, if you would, to identify that exhibit.

A It is a letter from Dr. Carlton Lancaster in Dalton, head of the Diabetes Center at Hamilton Hospital, advising me that I needed to take a leave of absence.

***

[GERALD WALDROP - RECORD VOLUME I, 146-149]
Cont. (1)

Q What is the date of that letter Mr. Waldrop?

A March of '91.

Q And then let me show you Plaintiffs Exhibit 35 and ask you, please, to identify that, Mr. Waldrop.

A It looks like a letter on March of '91 to - - from Joe Phillips to, it looks like Roger, and a carbon copy to Bill Spann, telling him that he thought it should be recommended that I take a leave of absence for 30 days. I can't read this.

Q Is there any reference to Exhibit 34 in Exhibit 35, any reference to Dr. Lancaster's letter?

A Yes. Undoubtedly, they sent a carbon copy to sent it to Roger and asked him to have Mr. Brown and Mr. Clark and Mr. Spann to look at it to see if they were agreeable with it, yes sir.

Q To okay a leave of absence?

A Yes, sir.

MR. STEWART: We would offer that, Judge, and we would like to publish it at this time.

THE COURT: Subject to any objections previously urged, let it be admitted.

BY MR. STEWART:

Q Now, when you were initially contacted about the leave of absence, did you take it?

A No, sir, I didn't.

Q Why was that?

A I was informed, or I informed Mr. Brantley when he called that I felt that if I left and took a leave of absence, that I would lose control of my office and, you know, lose the

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[GERALD WALDROP - RECORD VOLUME I, 146-149]
Cont. (2)

profitability that I had obtained through that time.

Q Did you subsequently take the leave of absence?

A Yes, sir, I did.

Q How dis that come about? Did somebody come and see you and talk to you about taking the leave of absence, Mr. Waldrop?

A Yes, sir, they did.

Q Who was it that came to see you in Dalton and talked to you about the leave of absence?

A Bill Spann, Joe Phillips, and D.C. Brantley.

Q Came to your office there?

A Yes, sir.

Q Who did the talking when they came there?

A Bill Spann.

Q And during the time, what did he tell you that he thought you ought to do? What did Mr. Spann tell you that he thought you ought to do?

A He told me I was going to take a leave absence.

Q For what period of time?

A For sixty days.

Q What was the reason that he gave to you on that date that he come to see you, Mr. Waldrop, for your having to take a leave of absence?

A He said the only reason was health problems, is the only thing he ever said to me.

***

[GERALD WALDROP - RECORD VOLUME I, 146-150]

BY MR. STEWART:

Q Did you have some kind of health problem that you experienced in this time frame, '90 to '91?

A Yes, I did.

Q Can you tell us what that health problem was?

A I have diabetes.

Q When did you learn that you had diabetes, Mr. Waldrop?

A When I was forty years old.

Q And how did you treat it?

A With insulin injections.

Q And did your condition get worse or better in the '90 to '91 period?

A In '91, it got worse.

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[GERALD WALDROP - RECORD VOLUME I, 146-150]
Cont. (1)

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MR. STEWART: We would offer that, Judge, and we would like to publish it at this time.

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[GERALD WALDROP - RECORD VOLUME 1, 146-150]
Cont. (2)

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A Yes, sir, I did.

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A He told me I was going to take a leave absence.

Q For what period of time?

A For sixty days.

Q What was the reason that he gave to you on that date that he come to see you, Mr. Waldrop, for your having to take a leave of absence?

A He said the only reason was health problems, is the only thing he ever said to me.

***

[GERALD WALDROP - RECORD VOLUME I, 146-150] Cont.

Q On that date, did he talk to you at all about any insubordinate behavior that ?????displayed toward either Joe Phillips or ??????

A No, sir, he did not ????

Q Did either Mr. Brantley or Joe Phillips say anything at all to you about this????

A He said nothing whatsoever during the conversation.

Q Did he talk to you on that particular date at all about any conversation that you might have had with other managers and any threats you might have made to other managers?

A He never said anything.

Q Did he ever indicate to you that this was anything other than a leave of absence for health reasons on that occasion?

A He never did.

Q And did Mr. Brantley or Mr. Phillips indicate anything to you other than on that occasion, Mr. Waldrop?

A They never did.

Q Have you ever seen a document that indicated that this leave of absence that you took on that date, did you ever see, during that period of time, a document that indicated to you that this was a reprimand of any kind?

A No, sir, I did not.

***

[GERALD WALDROP - RECORD VOLUME I, 149]

Q What was the reason that he gave to you on that date that he come to see you, Mr. Waldrop, for your having to take a leave of absence?

A He said the only reason was health problems, is the only thing he ever said to me.

***

[GERALD WALDROP - RECORD VOLUME I, 162-163]

Q And during the time you were manager of that office, Mr. Waldrop, did y'all receive bonuses during these years? Did the office receive a bonus.

A Yes, we did.

Q How did that bonus come to the office? How was the check made out?

A It was made out to me or any of the other employees I might want to give it to, however I decided I wanted to do it.

Q Can you tell the Ladies and Gentlemen of the Jury how they calculated your bonuses?

A Our bonus was figured on, we got five percent of our net profit up there, so, in other words, like if it was $300,000, we would get a $1,500 bonus.

Q What would you do with that bonus, Mr. Waldrop, when you got it there in the office? Was it up to the manager to do with it what you wanted?

A Yes, sir.

Q What would you do with it?

A I took mine and I would split it up between each employee I had, and what kind of job they were doing for me and for the company, and I used it as a motivation tool, I guess I would say, to make them help me make the company more money the following year.

Q Can you tell the Ladies and Gentlemen of the Jury what percentage of that bonus each year you would give to the employees?

A Out of the five percent, I would give them 2 percent or better a year.

Q When you say 2 percent, are you talking about 2 points or 40 percent, Mr. Waldrop?

***

[GERALD WALDROP - RECORD VOLUME I, 162-163] Cont.

A Yes, 40 percent.

Q Of the bonus?

A Or better than that.

Q You have indicated you weren't required to do that by the company. Was that what everybody did, or was that just up to the manager?

A It was up to the mangaer.

***

[GERALD WALDROP - RECORD VOLUME I, 176]

Q In this evaluation process, Mr. Waldrop, did anybody ever come to you, did Mr. Brantley ever come to you,

did Mr. Brantley ever come to you and say that there were some people in your office who were upset with you?

A No, he did not.

Q And they were concerned about the way you were operating and the way you were acting, or anything like that? Did anybody ever say anything like that?

A No, sir, they did not.

Q Now, Mr. Waldrop, was an audit performed at some period of time around the time you were getting this particular review or evaluation in '92, the last one we have put up there by Mr. Brantley?

A Yes, sir.

***

[GERALD WALDROP - RECORD VOLUME I, 177-179]

BY MR. STEWART:

Q Look at Plaintiff's Exhibit 47. Now, when you say audit, are they just looking at the books or are they looking at the office in general?

A Overall, everything in the office, all the complete operation.

Q Let me ask you if you can identify 47 and tell us, in fact, what that is.

A It was an audit done by D. C. Brantley on my office on April 13th through the16th of '92.

Q What did that audit cover, Mr. Waldrop?

A Personnel, operations, credit appraisals, escrows, logs of records, cashiering, collections, and REO's, and then there was a summary on it. And then it has just got different accounts he checked and different things.

Q If there was any problem that was happening, Mr. Waldrop, with your office staff or with the people that you dealt with as customers or people that you dealt with with the company, would it show up in this audit?

A Yes, it would.

Q Is there anything in the audit, as you look through Plaintiff's Exhibit Number 47, That indicated that you had been abusive to your office staff or abusive to your customers or abusive to anybody you dealt with?

A No, sir, there is not.

Q Threatened anybody or did anything out of - -

A No, sir.

***

[GERALD WALDROP - RECORD VOLUME I, 177-179]
Cont.

Q Was D. C. Brantley in that office when you weren't there on those occasions when he performed that audit?

A Yes, sir, a lot of times he was.

Q Would you have had the opportunity, as an auditor in your company, to talk to people who worked in your office separate and apart from you when he did the audit?

A Yes, sir, he would.

Q And ask them questions about what went on?

A Yes, sir, he would.

Q Did he do that, as you recall, Mr. Waldrop, on this occasion when he did that audit? Do you remember whether he did or did not?

A No, sir.

Q Did you handle every aspect of your business there? Would he have had to talk to some people in the office, Ms. Stafford, or Ms. McMillan or Ms. Welch, when he performed that audit?

A Yes, sir.

Q After the audit, do you have some sort of exit process that he does where comes by and talks to you and tells you, Gerald, here is your audit, this is what we found?

A Yes, sir. He goes over it , normally , with me.

Q During that time did he say anything to you about any problems or complaints he had?

A Never did.

***

[GERALD WALDROP - RECORD VOLUME I, 177-179] Cont. (1)

Q Did that go into your personnel file?

A Yes, sir, it did.

***

[GAROLD COOKE - RECORD VOLUME I, 36-38]

A Typically, if they wanted to get rid of someone, that they didn't have a real good reason to get of, they would start making notes of every little mistake they made, try to build a file so that when you did terminate them, you'd have at least some kind of reason for it.

Q Were you ever asked to build a file on any of your subordinates?

A Yes.

Q Who asked you to do that?

A Mark McKinney.

Q What was his position at that time?

A He was my direct report, Regional Director.

Q Was he a regional Vice-President?

A Yes, That was the official title.

Q Who were you asked to build a file on?

A Specifically, at that time, I remember it was Tim Ballins (phonetic), who was the manager who was running our office in Reynoldsburg, Ohio.

Q How old a man was Mr. Ballins?

A Probably forty-three or forty-four.

Q Was Mr. Ballins terminated?

A Yes.

Q Who assumed his position?

A He was replaced by a lady named Crystal Joseph.

***

[GAROLD COOKE - RECORD VOLUME I, 36-38]

Q Were you ever instructed to build a file on anyone else?

A Yes, but I don't recall the specifics at this time.

Q Have you ever attended any management meetings where Mr. Terrell Brown or Mr. Roger Clark were present?

A Can I go back to that last question? I do recall another person I had to build a file on; a fellow by the name of Don Ellis, who was a manager in Cincinnati at the time. And he was ultimately terminated, also.

Q How old was he?

A He was forty-eight, forty-nine at the time.

Q Do you recall who assumed his position?

A He was replaced by a fellow named Scott Sullivan.

Q How old was Mr. Sullivan?

A He was in his early thirties.

***

[GERALD WALDROP - RECORD VOLUME I, 238]

Q Did you know about - - well, let me phrase it this way. Mr. Zatzkis has asked you about whether or not you thought Sandy Stafford was truthful after you were terminated, and before you found out anything about these letters. Did you know about those letters until after you got into this lawsuit and after you got into discovery?

A No, sir.

***

[GERALD WALDROP - RECORD VOLUME I, 213]

Q Do you acknowledge you didn't get along with Ms. Stafford:?

A I get along fine with Ms. Stafford. If I hadn't have, Sandy would be gone. I worked with her ten years, and I would think that I got along with her.

Q Is it true that you could not work with Ms. McMillan?

A I really never had any problems with Ms. McMillan, until after I filed suit and found this out. No, I didn't know I had any problems at all with Pam.

Q Is it true you could not work with Ms. Welch?

A Really, honestly, I never thought I had any problems with Cheryl, other than the pencil. I was always good to Cheryl. I would never let anything happen to those girls, never.

***

[GERALD WALDROP - RECORD VOLUME I, 160-161]

Q Well, Mr. Waldrop, did you ever see anything in writing from Mr. Spann after you had that meeting with him down here that went in your personal file?

A No, I did not.

Q Were you ever offered the opportunity to see his account of the meeting after that fact?

A No, I was not.

Q Or to sign a document?

A No, I was not.

Q Generally, as you have indicated earlier, would that not be the policy?

A Yes, sir, it should be.

Q Well, did Mr. Spann tell you at any point in time while you were talking to him down here that he had been outside of Mr. Phillips, and outside of Mr. Brantley, and frankly, outside of you, calling your people, Ms. Stafford, Ms. Welch, and Ms. McMillan, on the phone and talking to them?

A No, he did not.

Q Did he ever share that with you when you came down to Baton Rouge, Mr. Waldrop?

A No, he did not.

***

[GERALD WALDROP - RECORD VOLUME I, 128-131]

Q How were you informed by the powers that be how you ranked on profitability?

A We would get a newsletter or a ranking with all the offices in the company, with a write-up on who was doing good jobs, who wasn't doing a good job. It was done monthly.

Q You were saying you got it when?

A I got it monthly.

Q Who made the decision as to how you were ranked:

A I guess accounting would have something to do with it, but Mr. Brown would normally send the newsletter out, the CEO of the company, or the President at that time.

Q Would you tell the ladies and gentlemen of the Jury how many offices there were that you were competing with at the time that you began with United, if you recall?

A It was approximately sixty, maybe, somewhere along there, when I started. When I left, it was probably 140 or so, at least.

Q Let me show you, if I could - -

MR. STEWART: May I approach, Judge?

THE COURT: Yes.

Q - - some exhibits that are marked in bulk, 30, and then we marked them - - I will show you what has been marked as Exhibit 30-A. Before I do that, Mr. Waldrop, let me just ask you, while I am here, did you keep some of those rankings as a part of your business records?

A I kept all of them, or the biggest part of them, yes.

Q Did you provide those for me, and did they indicate some of these rankings sheets for the

***

[GERALD WALDROP - RECORD VOLUME I, 128-131]
Cont.

years we have talked about?

A Yes, sir, they did.

Q Could you tell us what 30-A is for?

A It is just a write-up on the front about the lending division and the top ten offices.

Q What month was that?

A February of - -

Q That is all right.

A It is February of '88 is what it was.

Q Let me show you Plaintiffs' Exhibit 30-B, and ask you to identify that for us.

A This looks like one for March of '86, with a profit ranking on it.

Q It appears to be some other months behind that, so, Mr. Waldrop, make sure you go through those.

A In April of '86, and then they have write-ups on the offices that are doing good, and they mention my name and other managers' names that are doing a satisfactory job or an outstanding job. Then there is one in May of '86, June of '86.

A This is simply a letter we got monthly on profit figures, Judge.

THE COURT: I understand. I just want to know which letters now. You have talked about April and March of '86?

A Basically, these are '86, it looks like here.

Q Those are the months for '86?

A Months of '86, year of '86.

Q 30-B?

A This is through December of '87.

MR. STEWART: Judge, they are not complete each time because he kept the records and provided them to us.

THE COURT: I understand.

BY MR. STEWART:

Q I will ask you to identify 30-C.

A This is the same thing in January of' 87.

Q And then I will show you 30-D.

A This is the same thing in January of '87.

Q And then I will show you 30-E.

A This is the same type documentation, July of '88.

Q And I will show you 30-F.

A This is the same, in February, it looks like, or March of '88.

***

[GERALD WALDROP - RECORD VOLUME I, 128-131]
Cont.

Q Behind some of those documents there are other months that are listed?

A Right.

Q They follow in chronological order, do they not, Mr. Waldrop?

A Yes, they do.

Q In those documents that you now have before you, were there rankings given in those documents at a certain place?

A Yes, sir. Yes, sir, there were.

Q Were those rankings based on profitability?

A Yes, sir, they were.

Q Would you tell the ladies and gentlemen of the jury how they calculated the profit of a particular branch for a given month or a given year, Mr. Waldrop?

A Profit was figured after, you know, all expenses came out, employees' salaries, cars, just like any business would be run, taxes. In other words, the figures in here were the net profit figures, everything after taxes, health insurance, anything we might have.

Q So what we are talking about in profitability and how you would compare it to other offices is the net profit that would go to where? The home office of United Companies?

A Yes, sir.

Q And that is what the Dalton Branch made or the Atlanta Branch made?

A Yes, sir.

Q Tell me, if you would, Mr. Waldrop, how you ranked during that period of time?

***

[GAROLD COOKE - RECORD VOLUME II, 31]

Q What was the position you were in when you were terminated?

A Branch Manager.

Q How old were you when you were terminated?

A Forty-nine.

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[GAROLD COOKE - RECORD VOLUME II, 31]

Q What was the position you were in when you were terminated?

A Branch Manager.

Q How old were you when you were terminated?

A Forty-nine.

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[GAROLD COOKE - RECORD VOLUME II, 38]

Q Have you ever personally heard Mr. Brown or Mr. Clark make any comment about older employees?

A Yes.

Q What did you hear?

A Specifically, a comment that was made at one of the meetings. They were talking about some of the older men in corporate headquarters, that they wished they would go away so that they could get some new blood in the company.

***

[GAROLD COOKE - RECORD VOLUME II, 38]

A Specifically, a comment that was made at one of the meetings. They were talking about some of the older men in corporate headquarters, that they wished they would go away so that they could get some new blood in the company.

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[GAROLD COOKE - RECORD VOLUME II, 46]

Q Talking about your situation, I think you said that - - well, tell me again the approximate dates that you held the position of Area Supervisor.

A I was hired in March of '88.

Q How long did you hold that position?

A Until September of '95.

Q Tell me briefly what an Area Supervisor does.

A Well, normally, we would have anywhere from six to ten officers assigned to us, and we would travel to those particular branches and supervise the daily activities, make sure the loans were being made properly and put together properly in compliance with the laws and policies.

Q Were audits normally done in the offices you were responsible for?

A Yes, we were responsible for doing audits in our own branches a couple of times a year. And we had an audit department that - - I'm not sure what their exact schedule was, but normally once a year or year-and-a-half, they would do an audit in a branch.

Q At the time of your demotion, how many branches did you supervise?

***

[JIM DAVIS - RECORD VOLUME II, 80]

Q You had been a Regional vice-president for what period of time at that time?

A Between eight and nine years.

***

[JIM DAVIS - RECORD VOLUME II, 83]

Q You were then put to managing what particular branch?

A The Tampa 54 Office on El Prado.

Q Was there an opening there for you, or did they have to make one?

A No, sir, there was no opening.

Q How much advance notice did you have that this demotion was coming, before Mr. Phillips came?

A None

Q When Mr. Brown told you this, he indicated he told you he was going to do it with Mr. Callihan and Mr. Phillips and one other person, I think, Roger Clark. Did that ever happen to them?

A Not to my knowledge, it didn't.

Q You had a 90-day period that you were going to have this. What was supposed to happen to you, Mr. Davis, after you got through with that 90-day period?

A I would go back into my position as Regional vice-president.

Q What did you say to him when he told you that? - - To Mr. Brown.

A Well, I didn't agree with the decision, but I had to abide by it.

***

[JIM DAVIS - RECORD VOLUME II, 87]

Q What ultimately happened to you after you became Branch Manager?

A July of 1992, I was terminated.

Q What was the reason given for your termination?

A The chemistry wasn't right.

Q Did anybody ever say you didn't meet your production, or didn't do what you were supposed to do at the branch?

A It wasn't mentioned.

Q They just said the chemistry wasn't right.

A Right.

***

[JOE PHILLIPS - RECORD VOLUME II, 132-133]

A In the early nineties, he told me that he wanted the company to be mean and lean, and he wanted to go to a young, aggressive group of people.

Q Did he ever indicate to you what his feelings were about the people who had been with the company for some period of time? Let me ask you this question first: Did you have people at that time who had been with the company for some period of time, had some tenure with the company?

A Yes, sir, we still had quite a few.

Q Did you have people at that time, at middle level management positions, branch managers, like Mr. Waldrop over here, or in the Life company - - I know you didn't work there - - similar to Mr. Wyvill over here, who were about your age, over forty?

A You would have to ask that to where I could set you time frames on it because that varied from - -

Q Let me just say in the nineties, early nineties, did you have people who had been with the company for an extended period of time and who were over forty?

A Early nineties, the majority, what I would call the middle management, were over forty.

Q Did Mr. Brown express any opinion as to what he felt ought to happen to those people?

A Several of them, he asked myself and Mr. Davis, to get rid of.

Q When you say several of them, what was he talking about?

A He was talking about getting them out of the company.

Q These are the people that I referred to, that had tenure, that were over forty?

A The three of them I'm thinking of right now, they all had at least ten or over ten years' experience, and they were in supervision.

Q Did he ever make any general statements about what he might like to do with people who had been there with the company for a while?

A Just that he wanted to get the company mean and lean, get rid of the people that were there, so

***

[JOE PHILLIPS - RECORD VOLUME II, 132-133] Cont.

that we can make more money, be more aggressive, more productive.

Q Can you tell us what happened to those three people he asked you about?

A One of them was fired, to my knowledge, and the other two retired.

***

[JOE PHILLIPS - RECORD VOLUME II, 132]

A Early nineties, the majority, what I would call the middle management, were over forty.

***

[JOE PHILLIPS - RECORD VOLUME II, 134-135]

A At the time Mr. Brown and I discussed this, I pointed out my concerns to Mr. Brown that - -

Q Well, first, before you do that, tell the Ladies and Gentlemen of the Jury what concerns you expressed to Mr. Brown.

A I expressed to Mr. Brown that I felt that with the rapid growth rate we were experiencing, to lose several people with experience would be detrimental to the company, as far as having more bad loans, not have properly trained people. And I expressed my concern that I felt that a company ran on all the people, which was a mix, from people that had long tenures and considerable experience, to people just starting out and learning the business. I think it takes both types.

Q How did he respond to that?

A He went back and told me again what he wanted to do with the company to progress the company, and we ended the conversation.

***

[JOE PHILLIPS - RECORD VOLUME II, 135]

Q Did you talk to Mr. Spann about it?

A Yes.

Q What did he tell Mr. Spann?

A I expressed my concerns of theis. I also expressed my concern about the possible exposure the company would have because the people we would be dealing with were in a protected age group.

***

[JOE PHILLIPS - RECORD VOLUME II, 136-137]

A Build a file.

Q What does that mean?

A Build a file with docuents of all the problems you've had, of any counseling sessions, everything that's happened in that employee's life, with the history of the company.

Q Which would be useful to do what?

A It would be useful if you terminated them, if they filed a lawsuit against you.

***

[JOE PHILLIPS - RECORD VOLUME II, 147]

BY MR. STEWART:

Q Let me show you Exhibit 34, and ask you if you can first identify that as perhaps the document that you...

A Yes, sir.

Q That's a letter from a Dr. Carlton Lancaster, that has to do with the diabetes problem that Mr. Waldrop had?

A Yes, sir. It appears that it was received by me and obviously sent - - I don't know where else, but it was faxed somewhere else. It's dated March 14th, and I received it at some time after that, and on March 22nd, I faxed it to - - it has my fax coding at the top.

Q Let me show you Exhibit 35, and ask you if that, in fact, is not the fax that was sent.

A This is a letter to Roger Clark where I recommended we grant Gerald a 30-day leave of absence. The letter is dated 3/22. I also copied Bill Spann and asked him to read the letter, and if he and Mr. Clark and Mr. Brown and - - I asked him, "If you and Mr. Clark and Mr. Brown are in agreement, I feel we should grant a paid leave of absence."

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[JOE PHILLIPS - RECORD VOLUME II, 147]

A This is a letter to Roger Clark where I recommended we grant Gerald a 30-day leave of absence. The letter is dated 3/22. I also copied Bill Spann and asked him to read the letter, and if he and Mr. Clark and Mr. Brown and - - I asked him, "If you and Mr. Clark and Mr. Brown are in agreement, I feel we should grant a paid leave of absence."

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[JOE PHILLIPS - RECORD VOLUME II, 148-149]

Q And tell us, if you would - - tell the ladies and gentlemen of the jury what was the purpose of you all going over there to see him, to get him to take the leave of absence?

A To get him to take a leave of absence because we were concerned for his health.

Q Was that the purpose of your trip?

A That was the purpose of the trip, to get the leave of absence, yes.

Q Was it a disciplinary matter, that you saw it as, as you went over there to see Mr. Waldrop?

A I think it would have been a disciplinary matter in respect - - ask the question again, please.

Q Well, was it a disciplinary matter? Did you all go over there to discipline him, or did you go over there

to ask him to take a leave of absence for his health, Mr. Phillips?

A We went over there to ask him to take a leave of absence for his health because we were concerned for his health.

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[JOE PHILLIPS - RECORD VOLUME II, 149]

A We went over there to ask him to take a leave of absence for his health because we wereconcerned for his health.

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[JOE PHILLIPS - RECORD VOLUME II, 160]

A As I stated earlier, I attended the firing of Gerald Waldrop. I didn't participate in the firing of Gerald Waldrop.

Q Did you have any conversation with him at that time? - - Mr. Waldrop.

A Maybe three or four sentences, very little.

Q Who did most of the talking during that period of time?

A Mr. Spann.

***

[RIDGLEY WYVILL - RECORD VOLUME II, 241]

Q Can you tell us who your assistant was in 1993, when you were terminated?

A Margaret Moon.

Q When did you hire Ms. Moon?

A Some five years hence.

Q Five years before?

A Yes.

Q At the time you were terminated, how old were you?

A Fifty-three.

***

[RIDGLEY WYVILL - RECORD VOLUME II, 242]

Q Do you have personal knowledge of who took your place?

A I do.

Q Who was that?

THE COURT: He's testifying to his personal knowledge. If you disagree, you can cross-examine him and bring on other witnesses.

BY MR. STEWART:

Q Who was that person?

A Margaret Moon.

Q Do you have an idea of how old she was at that time?

A She was thirty-three.

***

[RIDGLEY WYVILL - RECORD VOLUME II, 242]

Q Do you have personal knowledge of who took your place?

A I do.

Q Who was that?

THE COURT: He's testifying to his personal knowledge. If you disagree, you can cross- examine him and bring on other witnesses.

BY MR. STEWART:

Q Who was that person?

A Margaret Moon.

Q Do you have an idea of how old she was at that time?

A She was thirty-three.

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[RIDGLEY WYVILL - RECORD VOLUME II, 243-244]

Q Now, during the time that you worked with United Companies, did you receive a pay raise each year?

A Yes, sir, I did.

BY MR. STEWART:

Q Does that indicate that you received a salary increase for each year that you worked for the company?

A Yes, sir.

Q I don't know whether you can see that, or not. Does that document that we introduced indicate, Mr. Wyvill, that you got a raise in '92?

A Yes, sir, it does.

***

[RIDGLEY WYVILL - RECORD VOLUME II, 246-247]

BY MR. STEWART:

Q Now, is this the evaluation you got in 1/8/92 from Frank Nelson?

A Yes, sir.

Q Tell me, if you would, who Mr. Nelson was at that time.

A Frank Nelson was made an Assistant vice-president, and he was in charge of marketing With the Credit Life, and he handled the Credit Life. He was over Credit Life forMarketing and he also was over the Life products that were produced on the outside.

Q Okay. And in connection with your immediate supervisor?

A Yes, sir.

Q And he gave you your rating for this period of time, 2/1 of '91 to 1/8 of '92?

A Yes, sir.

Q Now, this box over here indicates how you did in specific job responsibilities at that time?

A Yes, sir.

Q In job knowledge, it indicates that you did what, met your responsibilities?

A Yes, sir.

Q Job performance. This indicates how the results of Employee's performance relate to your expectation of the employee's performance. It indicated there that you exceeded in that category.

A Yes, sir.

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[RIDGLEY WYVILL - RECORD VOLUME II, 246-247]
Cont.

Q Attitude and cooperation, judgment, common sense; is that not right, Mr. Wyvill?

A Yes, sir.

Q Now, your personal work habits, he has very organized; with relation to record keeping in the department, other employees can easily take over. Does that relate to the manner in which you trained the people that work under you Mr. Wyvill?

A Yes, sir.

Q Additional Job performance, supervision of administrative staff, meets an overall rating. That was done on 1/21 of '92; is that correct?

A Yes, sir.

***

[? MOORE - RECORD VOLUME II, 13-15]

A He began to be pretty volatile with his anger. He had difficulty controlling his temper.

Q Did Mr. Burkes ever direct his anger towards you?

A Oh, yes.

Q In what way?

A He railed, he screamed, he slammed doors, cursed. I've seen him slam the phone down so hard he broke the cup (phonetic) off the telephone. He was very intimidating. He was a control type person. He got angry at the drop of a hat. He just could not control his temper.

Q Did you see this anger frequently or infrequently?

A Saw it over the entire course of my employment with United Companies.

Q Did you ever see Mr. Burkes get angry or volatile with any other employees?

A Yes, I did.

Q Did you see this on a regular basis?

A Yes, I did.

Q Did you ever hear Mr. Burkes use profane or foul language?

A Yes, I did.

Q Did you hear him use profane or foul language directed at employees?

A Yes.

A Did you ever hear Mr. Burkes be rude to customers?

A Yes. There was a particular incident where a customer by the name of - - -

MR. ZATKIS: Objection. Hearsay, to the extent she's going to testify about customers.

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[? MOORE - RECORD VOLUME II, 13-15] Cont.

THE COURT: I think she can testify about something she observed, but not necessarily what the customer said. And do not repeat the verbiage of the customer. You can describe what you observed without going into what the person stated.

A Okay. A customer came into the office, wanted to see Mr. Burkes. We had just recetnly closed a mortgage loan for him. I went back to Mr. Burkes office and told him that the customer was in the lobby. He said,

what doe he want? I don't have time for that stupied idiot. I'm not going out there and speaking to him . So, I had to go back out into the lobby and make an excuse to this customer, that we had just closed a mortgage loan for.

BY MS. GRIFFIN:

Q You said that Mr. Burkes called the customer a stupid idiot. Did Mr. Burkes ever call anyone else a stupid idiot. Or any other belittling term such as that?

A Yes, that was a pet name of his, idiot. Screw you, or screw them. He did not like mortgage Brokers, in general, and he would - - you know, if they sent us business, and it wasn't just like he wanted, he would say, if they don't like it, then screw them. I've heard him use the term stupid nigger, you know, things like that.

***

[RIDGLEY WYVILL - RECORD VOLUME II, 252-255]

Q When did he first approach you about that, Mr. Wyvill?

A Probably late November of '92.

Q What did he tell you that he wanted to do at that time, Mr. Wyvill?

A He had - - well, just prior to that, we had the "Un-Link", which is this newsletter we're talking about. He knew that I knew all the people in the branches and all the branch managers and so forth. He asked me if I would contact the branches and even people that were terminated, and find out what was meant by the statement in two "Un-Links"s that he had in his possession, referencing the future happenings in Chattanooga, Tennessee, like something bad was going to happen. He wanted to know if I could find that out through branch managers presently employed by United Companies and evern terminated, if necessary.

Q What did you tell him on that occasion, Mr. Wyvill?

A I told him I could not do that, that I knew that if I was caught fooling with that "Un-Link" that I would be terminated by his father, because his father was irate over that thing, and everybody knew it.

Q All right. Now, did he accept that, or did he come back to talk to you again?

A He came back a couple of days later, and closed my office door, and he began to talk about the same subject. I told "Tee" that I was ver loyal to his grandfather because he was good to me personally and to Dan Burns, who had been good to me, and to the company that had been god to me. And we talked about it, but I said, "Tee", I just cannot justify doing this thing. If I start to pick up the phone and start making phone calls,

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[GAROLD COOKE - RECORD VOLUME I, 252-255]
Cont.

something is going to get back to Terrell, your father, or someone, and I'm going to get in trouble or be fired. I can't do this thing.

Q Did he accept it on that date?

A He left that day, yes, sir.

Q Did he later come back and talk to you again?

A Yes, he did. He came back and he closed the door again, and he started the same subject, asking me to do that, that it was very important. I said, "Tee", you know, this is dangerous stuff and I just can't do it. And he said, well, Ridgley, if you do this, you're doing it for my father.

Q Did you agree to do it on that occasion, Mr. Wyvill?

A Yes, I did.

Q When you made these telephone calls, when was that, Mr. Wyvill?

A It was late November, December, and January. That's '92, and then January of '93.

Q Now, when you would get information, would you make that information known to Mr. "Tee" Brown?

A Yes. As I talked to the people out there, I had a legal pad. I'd ask the question and write the question down. Then I'd write the response down and who gave the response. And all of this was compiled, and "Tee" Brown, almost daily, would come by and I'd give him what I had developed.

Q Did he indicate to you at that time that he was giving it to his father?

A Yes, he did, and I warned him not to mention anything about what he saw in writing to anyone except his father because this information was raw, unabridged, and it could be

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[GAROLD COOKE - RECORD VOLUME I, 252-255]
Cont. (1)

lies, it could be the truth. I had no way of knowing. I said, be very, very careful with it.

Q Mr. Wyvill, do you know, from your history with the company, if there had been some effort made, by other people, to investigate the "Un-Link" and find out who the editor was?

A Yes, sir.

Q Now, Mr. Wyvill, you were not the editor of the "Un-Link"; were you?

A No, sir.

Q You had nothing whatsoever to do with that paper and the circulation of the papers?

A No, sir.

Q All you were doing, in this instance, was for the C.E.O.'s son, trying to find out what you could, at his request?

A I was working for Terrell Brown, yes, sir.

Q Now, did you keep copies of those documents, those little notes you made and gave to - - -

A No, sir.

Q Can you tell the ladies and gentlemen of the jury why you didn't.

A The information in there was bad. The things that were being said were very, very dangerous stuff. You just did not want this information to go to just anyone, so I did not copy it. I gave it to "Tee", and "Tee" Brown told me he was carrying it directly to his father, and that I was doing that, as an employee, to help Terrell Brown.

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[JIM DAVIS - RECORD VOLUME II, 90-92]

Q Tell the Ladies and Gentlemen of the Jury when that was.

A D.C. Brantley was an area supervisor in my region in 1983, and then again later, in 1992.

Q During that period of time, did you have an opportunity to observe him and how he worked with people?

A Yes.

Q Did you form any opinion based on those observations as to what kind of manager he was?

A Yes.

Q Can you tell the Ladies and Gentlemen of the Jury what kind of manager you thought he was?

A D.C. was a very good person. His management style was a little rough. He came across wrong to his people. He didn't do a proper job in motivating employees in a branch. He just, I guess, kind of rubbed the people the wrong way.

Q Did you ever talk with him about that?

A Yes, I did.

Q Did you ever talk with him specifically at any point in time about a problem he might have had with Mr.

Waldrop and that Mr. Waldrop might have had with him?

A I was the regional Vice-President and Mr. Brantley was the area supervisor. Mr. Waldrop was a branch manager.

Q So, they reported up the chain of command to you?

A Yes.

***

[JIM DAVIS - RECORD VOLUME II, 90-92] **Cont.**

Q What, if anything, did you tell Mr. Brantly he needed to do about that problem?

A I asked Mr. Brantley what the problem was between him and Mr. Waldrop.

Q Did you then tell him what he needed to do to solve that problem?

A Yes.

Q What did you suggest he do to solve it?

A I suggested he go spend some time with Mr. Waldrop, go play golf, do whatever, work out your differences because I didn't want to have a conflict in that office going forward. He did that. He reported back to me that it was taken care of, no more problems.

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[JOE PHILLIPS - RECORD VOLUME II, 144-145]

Q Now, at some point in time, did you ever supervise a gentleman named Brantley?

A From 1985 till January of '92, he reported directly to me.

Q Did you have an opportunity to observe him, in a managerial capacity?

A Yes, sir.

Q Can you describe, for the Ladies and Gentlemen of the Jury what kind of managerial style Mr. D. C. Brantley had?

A I don't know that I would define it as a style. He just had one type of managerial style.

Q Well, how did he operate with other people? Let me ask it that way.

A He operated with each one of them the same. There was no deviation.

Q Would you say he had to motivate people to get people to do things, if they had different characteristics, traits, personalities?

A As I said, he motivated everyone the same way. No two people were motivated the same way, my dealings

in the years in this business. But he did it all the same way, which created problems on several occasions.

Q Did you have conflict between Mr. Brantley and other people that he might have been managing, if you hadn't resolved it during the time you were supervising him?

A Yes, sir.

Q Did one of those involve Mr. Gerald Waldrop, over here to my right?

A On several occasions.

***

[?MOORE - RECORD VOLUME II, 20]

A Well, The North Charlotte Branch actually opened in August of 1990, so from then until December of '95, it was actually a four-and-a-half-year period, and at least twenty-five people left.

Q And from you own personal knowledge of being in the branch, do you know why these people left the branch?

A Many of them left out of fear, intimidation, or due to personal conflicts with him.

***

[JOE PHILLIPS - RECORD VOLUME II, 170-171]

Q All right. At some point in time, did you indicate to Mr. Brown, in any way, who Mr.Scott was refusing to tell him about during the call?

A As Mr. Brown continued to press Mr. Scott, I saw Mr. Brown was starting to get agitated at Mr. Scott because he wouldn't tell him. I wrote a note on a piece of paper - - like, I was sitting here, and Mr. Brown was sitting to my immediate right. I passed it under the edge of the table, a note that said "Tee" on it.

Q What happened after that?

A Mr. Brown wound the conversation down fairly fast, told Mr. Scott what a loyal employee he was, and how much he thought of him, and seven months later they closed Mr. Scott's branch and he was out of a job.

Q How long after that, when you all closed that conversation down, was the decision made to fire Mr. Wyvill?

A Fifteen to thirty seconds.

Q Who indicated that Mr. Wyvill should be fired?

A Mr. Brown.

Q At that point in time, had anybody talked to Mr. Wyvill about this?

A Mr. Wyvill hadn't been in the room at that point, I don't believe, as best as I recall.

Q Had anybody talked to "Tee" Brown?

A To my knowledge, "Tee" Brown was never talked to.

Q I'm talking about at that time. Did anybody ask him, hey, "Tee", did you tell Ridgley to do this stuff?

***

[JOE PHILLIPS - RECORD VOLUME II, 170-171] Cont.

A No, sir, not that I was made aware of. We didn't want to venture out on that road because we didn't know the situation there, and we didn't want to create any embarrassment for Mr. Brown.

Q Who said fire him?

A Mr. Brown.

Q What did he say when he said to fire him?

A When he hung the phone up, he immediately said, I want the son-of-a-bitch gone.

Q Who was he referring to, so that the record is clear?

A To Mr. Wyvill.

Q And after that, to your knowledge, was Mr. Wyvill fired?

A Some later time, Mr. Wyvill was fired. I wasn't involved in the firing.

***

[JIM DAVIS - RECORD VOLUME II, 93]

Q What was his feeling about older people, Mr. Davis, based on his comments to you?

A Well, he just felt that some of the people - - and I'm speaking strictly of people that worked under me - - that the world had passed them by, that they were just too old to get the job done, and that we should either find another position for them or terminate them.

***

[JOE PHILLIPS - RECORD VOLUME II, 159-160]

Q Did you later go with Mr. Brantley and Mr. Spann to East Ridge, Tennessee, to fire Mr. Waldrop?

A I attended - - yes, I was sent to attend it.

Q Why were you sent to attend it?

A Because I had worked with Gerald for a long period of time, and Mr. Brown felt it would be better for me to go, even though I wasn't in the immediate line. Mr. Callihan was his regional V.P.

Q Who had asked you to go along, Mr. Brown?

A Yes.

Q Had you gone to see Mr. Brown about this, with anybody?

A With Mr. Spann, Mr. Clark, and, I believe, Mr. Callihan was there.

Q At that time, did you see any documentation of purported reasons or basis for making an assumption that he was having some difficulties in his office?

A I don't recall.

Q Did you see any letters?

A I don't recall that.

Q Okay.

A We are talking about January '93, right?

Q Yes.

A I don't recall that.

Q Did you go then, after you talked to Mr. Brown, up to East Ridge, Tennessee, and

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[JOE PHILLIPS - RECORD VOLUME II, 159-160] Cont.

participate in the firing of Gerald Waldrop?

A As I stated earlier, I attended the firing of Gerald Waldrop. I didn't participate in the firing of Gerald Waldrop.

***

[JOE PHILLIPS - RECORD VOLUME II, 146-149]

A Mr. Waldrop's supervisor, Mr.Brantley - - I believe this is at some point, but I believe it was Mr. Brantley reported to me, that Mr. Waldrop had a letter from his doctor saying that his diabetes was creating a lot of problems for him and he needed to take a leave of absence to see if he could get his diabetes straightened out.

BY MR. STEWART:

Q Let me show you Exhibit 34, and ask you if you can first identify that as perhaps the document that you...

A Yes, sir.

Q That's a letter from a Dr. Carlton Lancaster, that has to do with the diabetes problem that Mr.Waldrop had?

A Yes, sir. It appears that it was received by me and obviously sent - - I don't know where else, but it was faxed somewhere else. It's dated March 14th, and I

received it at some time after that, and on March 22nd, I faxed it to - - it has my fax coding at the top.

Q Let me show you Exhibit 35, and ask you if that, in fact, is not the fax that was sent.

A This is a letter to Roger Clark where I recommended we grant Gerald a 30-day leave of absence. The letter is dated 3/22. I also copied Bill Spann and asked him to read the letter, and if he and Mr. Clark and Mr. Brown and - - I asked him, "If you and Mr. Clark and Mr. Brown are in agreement, I feel we should grant a paid leave of absence."

Q Did you participate with any of those people that Mr. Spann - - anybody else - - and at some point in time go into Mr. Waldrop's office and talk to him about taking a leave of absence?

A Mr. Brantley, Mr. Spann, and I, we went to Mr. Waldrop's office, yes.

Q Before that time, did you have any conversations yourself with Mr. Waldrop about taking a leave of absence? - - you, yourself?

A I don't recall whether I actually talked to Mr. Waldrop myself. I know either Mr. Brown or Mr. Spann had talked to him, and Mr. Waldrop had basically resisted going on a leave of absence because of his concern for his office.

Q And tell us, if you would - - tell the ladies and gentlemen of the jury what was the purpose of you all going over there to see him, to get him to take the leave of absence?

A To get him to take a leave of absence because we were concerned for his health.

Q Was that the purpose of your trip?

A That was the purpose of the trip, to get the leave of absence, yes.

Q Was it a disciplinary matter, that you saw it as, as you went over there to see Mr. Waldrop?

A I think it would have been a disciplinary matter in respect - - ask the question again, please.

Q Well, was it a disciplinary matter? Did you all go over there to discipline him, or did you go over there to ask him to take a leave of absence for his health, Mr. Phillips?

A We went over there to ask him to take a leave of absence for his health because we were concerned for his health.

***

[RIDGLEY WYVILL - RECORD VOLUME III, 14]

Q At any point in time, during that conversation, did you say anything to her, to this effect, that if you took the job, it would be the same as taking blood money?

A No, sir. I did mention blood stripe, but that's what it was called when that stripe was ripped off. I did say that.

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[RIDGLEY WYVILL - RECORD VOLUME III, 19]

Q Did you have a staff working under you at that time?

A Staff of three people, yes, sir.

Q Was a Ms. Moon working under you at that time?

A Yes, sir.

Q Who took your place?

A Margaret Moon.

***

[RIDGLEY WYVILL - RECORD VOLUME III, 33]

BY MR. STEWART:

Q Was Ms. Moon younger or older than you were?

A She's thirty-three.

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[MICHELLE BARNETT - RECORD VOLUME III, 82-86]

Q How did you come to meet "Tee" Brown?

A "Tee" and I worked very closely while he was in the actuarial department. "Tee" was the manager trainee when he first joined the Life company. He went from department to department working, kind of getting an overview of what the life company did. When he came to the actuarial department, we worked very closely together.

Q Do you recall when "Tee" came to the actuarial department, what year?

A Yes, it was the end of September '92.

Q After you and "Tee" had become acquainted in the actuarial department, did you and "Tee" ever work on any projects together?

A Yes, we did. We also worked on a project before he actually came to the actuarial department.

Q What was the first project you worked on with "Tee" Brown?

A The first project regarded 1035 exchanges, which were policies which were rolling over from one insurance company to United Companies.

Q How did it come about that you and "Tee" Brown worked on this project together?

A "Tee" was in the licensing department at the time, and he was noticing what he believed might have been inefficiencies in the way the marketing department was doing certain work regarding the 1035 exchanges, so he brought some raw data, that he got from the licensing department, to me, and asked me to do some analyses on it, do some number crunching.

Q Did you do that analysis?

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[MICHELLE BARNETT - RECORD VOLUME III, 82-86] Cont.

A Yes.

Q What did you do after you had done the analysis?

A Well, I reported back to "Tee" what I had found, what my conclusions were on it.

Q And after you reported it back to "Tee" what your conclusions were, was that the end of the story, or did anything else occur?

A No. "Tee" asked that I attend a weekly - - He would go into weekly meetings with the president and the chief administrative officer of the company every Friday. He wanted me to attend one of those meetings with him, to present our findings to them.

Q You said that he asked you to go to the weekly meeting. Who was the president?

A Gary Warrington.

Q Who was the executive vice-present?

A Lindsay Seals.

Q Did you attend this weekly meeting with "Tee" Brown?

A I attended two of them.

Q What happened as a result of your and "Tee" Meeting with Mr. Warrington and Mr. Seals?

A Well, the first meeting, we just showed our findings to them. Then "Tee" made suggestions on what he felt needed to be done to clear up the inefficiencies. The second meeting was a follow-up meeting, to see what Gary Warrington, the president, what his decisions

were on the changes that were going to be implemented, if any.

Q Were any changes implemented because of these meetings?

***

[MICHELLE BARNETT - RECORD VOLUME III, 82-86] Cont. (i)

A Yes, a pretty major policy change was instituted throughout the company.

Q After the 1035 project that you worked on with "Tee" Brown, did you work on any other projects with Mr. Brown?

A Well, he asked me to work on projects. He brought projects to me and asked me to consider them and do some investigative work into them.

Q Did Mr. Brown ever ask you to look into a cost analysis project?

A Yes, that was one of the projects.

Q Would you explain what the cost analysis project was?

A As I said, "Tee" was very interested, when he came to the company, to find inefficiencies. He was in the process of - - He was going to be attending a seminar where companies were taught how to conduct these extensive cost analyses of their entire company. It was very detailed, down to the point of how much did

it cost to seal an envelope. That's how detailed it was. He had in mind what he wanted to do, and he asked me - - He had in mind what he wanted to do, and he asked me to approach my boss, who was Kitty Kennedy, and kind of try to sell her on the idea of it, because it was going to take so much time, I couldn't just go off and do this without my boss knowing what I was doing.

Q At that time, was your boss, Kitty Kennedy, also the chief actuarial - - -

A She was the chief actuary.

Q All right. Did you go talk to Ms. Kennedy about this cost analysis project?

A Yes.

Q What did Ms. Kennedy tell you?

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[[MICHELLE BARNETT - RECORD VOLUME III, 82-86] Cont. (2)

A Well, she got pretty upset with me that I even let "Tee" entertain such thoughts. She told me that he was getting a reputation for being a hatchet man in the company, and I needed to stay away from him. She told me that his reputation was such that he would come into the Life company and - - -

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[MICHELLE BARNETT - RECORD VOLUME III, 84-85]

A No. "Tee" asked that I attend a weekly - - He would go into weekly meetings with the president and the chief administrative officer of the company every Friday. He wanted me to attend one of those meetings with him, to present our findings to them.

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[MICHELLE BARNETT - RECORD VOLUME III, 83-90]

Q After you and "Tee" had become acquainted in the actuarial department, did you and "Tee" ever work on any projects together?

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Q What was the first project you worked on with "Tee" Brown?

A The first project regarded 1035 exchanges, which were policies which were rolling over from one insurance company to United Companies.

Q How did it come about that you and "Tee" Brown worked on this project together?

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Q Did you do that analysis?

A Yes.

Q What did you do after you had done the analysis?

A Well, I reported back to "Tee" what I had found, what my conclusions were on it.

Q And after you reported it back to "Tee" what your conclusions were, was that the end of the story, or did anything else occur?

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[MICHELLE BARNETT - RECORD VOLUME III, 83-90] Cont.

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[MICHELLE BARNETT - RECORD VOLUME III, 83-90] Cont. (2)

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A She was the chief actuary.

Q All right. Did you go talk to Ms. Kennedy about this cost analysis project?

A Yes.

Q What did Ms. Kennedy tell you?

A Well, she got pretty upset with me that I even let "Tee" entertain such thoughts. She told me that he was getting a reputation for being a hatchet man in the company, and I needed to stay away from him. She told me that his reputation was such that he would come into the Life company and - - -

BY MS. GRIFFIN:

Q Other than the licensing project and the cost analysis project, did you witness any other projects that Mr. Brown instituted at the Life company?

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[MICHELLE BARNETT - RECORD VOLUME III, 83-90] Cont. (3)

A Yes, I did.

Q Would you briefly describe some of those projects?

A Well, one was the quality circle. Do you want me to explain what that was?

Q Yes, please.

A "Tee" had pretty much just gotten out of college, and I think the big thing, at that time, when he got out, was quality circles. Companies were getting into quality circles, where the employees would - - A group of employees would band together and suggest cost saving measures. That was a really big pet project of his. He was really gung ho about the quality circles. The other one was - - Of course, the Life company Christmas party, he spearheaded that.

Q When you were working for "Tee" Brown, did he ever come into your office?

A Yes, often.

Q While Mr. "Tee" Brown was in your office, would anyone else come in and interrupt you, that was looking for "Tee"?

A Yes. Numerous people would often come in.

MR. ZATKIS: Objection, Your Honor. This is going to be hearsay.

MS. GRIFFIN: No, she's not going to say what they said. She's just going to say that people came into her office.

THE COURT: So far it's not hearsay. Go ahead.

BY MS. GRIFFIN:

Q Would people come in and interrupt?

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[MICHELLE BARNETT - RECORD VOLUME III, 83-90] Cont. (4)

A Yes.

Q Do you recall any of the people that would come in and interrupt you?

A Yes. Cary Pepper came on occasion, Kitty Kennedy came. I don't know if she was kind of curious as to what we were doing, but she came a lot.

Q Did Mr. Wyvill ever come?

A Yes.

Q Do you recall what the purpose of Mr. Wyvill coming to yours and "Tee"'s meeting was?

A It really wasn't a meeting. We would just be having a conversation, discussing certain matters regarding work. Ridgley would just stop by the door. The one time that I remember - - It was more than one time, but, in particular, it was kind of like he was giving a

report, kind of a mini-update to "Tee" on what he had been working on.

Q Was it your impression that Mr. Wyvill was working on a project for "Tee" Brown?

A Yes.

Q All right. You said that you saw Mr. Wyvill come more than once into your office and report to "Tee".

A Yes.

***

[TERRELL BROWN, SR. - RECORD VOLUME III, 146-147]

Q And as a practical matter, you were familiar with Gerald's leave of absence for health reasons, that he took before that, in 1991; were you not?

A Absolutely.

Q In fact, you approved it; didn't you?

A I did. It was an exception to our policy. We paid for the leave and we paid for the medical during that period of time. And Gerald was not demoted. He later returned to his position that he held prior to that, after he had gotten a release from his doctor.

Q Well, if someone has a health problem, such as he had - - he had diabetes; didn't he?

A I don't know that specifically.

Q Let me just refresh your recollection.

MR. STEWART: May I approach the witness?

MR. STEWART: Yes, you may.

MR. STEWART: I'm looking at Exhibits 35 and 34.

BY MR. STEWART:

Q Take a look at 34 and 35 and 36, Mr. Brown. Just look at each one and then I'll ask you some questions about them.

A All right, sir.

Q Now, 34 is a letter from the doctor, indicating that Mr. Waldrop had some kind of diabetes problem and he needs to have a leave of absence; is that not correct?

A Right. The doctor says here he seems to be under a great deal of stress due to the problems and thinks it is adversely affecting his diabetic control and general health. He

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[TERRELL BROWN, SR. - RECORD VOLUME III, 146-147] Cont.

was recommending a 30-day absence.

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[TERRELL BROWN, SR. - RECORD VOLUME III, 152]

Q Didn't Mr. Wyvill tell you, at that time, Mr. Brown, that he was making those phone calls because your son asked him to?

A He might have said that, but I can assure you that a lowly trainee had no authorization to do anything.

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[TERRELL BROWN, SR. - RECORD VOLUME III, 166-167]

A Not really any. You know, that was - - He's a trainee, and he doesn't have any authority whatsoever. He's really down there to learn.

Q Now, when you heard about the phone calls that Mr. Wyvill had made, and even after you were told that your son had told him to make those phone calls to Mr. Scott and Ms. Stafford, among others, what was your reaction to that?

A It was ridiculous. He certainly wasn't authorized. And I know my son very well; he wouldn't do that.

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[WILLIAM SPANN - RECORD VOLUME III, 225-226]

Q There is just one little thing in there that you said, that I want to make sure I'm clear about.

A Okay.

Q You indicated that he was told, in November of 1991, that this was not a disciplinary action?

A No, sir. May of 1991 was not the - - -

Q Oh, May of 1991, this was not a disciplinary action?

A That's correct, it was not.

***

[WILLIAM SPANN - RECORD VOLUME III, 192]

Q As a practical matter, the company acted differently in Mr. Dwayne Burkes' case than they did in Mr. Gerald Waldrop's case when they received some letters about abusive behavior from employees?

A I would say we were easier on Gerald than we were on Dewayne, Yes.

Q Well, you put him in a position ultimately where he was a special projects person for Mr. Hargan; didn't you - - president of the lending company.

A That is correct.

Q Paid for counseling for him?

A That is correct.

Q Gave him a company car?

A I don't know about that.

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[WILLIAM SPANN - RECORD VOLUME III, 188-191]

Q Tell me, Mr. Spann, as human resources director, were you involved with what happened to Mr. Burkes after this thing took place, after you got these complaints?

A To some degree, yes.

Q Did he receive counseling that was paid for by the company?

A You mean, ultimately?

Q Yes, sir.

A Yes, sir, he did. Let me rephrase that. We offered to pay for consulting for him. Whether or not that was ever done, I just don't know because I was not involved to that extent.

Q Was there a complaint made by Becky Iverster (phonetic) in 1991, before that took place, Mr. Spann?

A I remember the name Debbie Iverster. I don't remember a complaint.

Q Do you remember her making any complaints perhaps to Mr. Brown, in 1991, that you became familiar with? Does that refresh your recollection?

A If I saw the complaint, maybe I would, but just from my memory, I don't recall that.

Q Let me ask you, Mr. Spann, if you remember a complaint being made before these were received by you or Mr. Brown, these letters that I have just introduced into evidence in 1996?

A You have one in there from Amy McClain, and then the letters from 1996. The McClain memorandum is from 1993. I just don't recall any...

Q You don't recall any complaints being made by Ms. Iverster in 1991?

***

[WILLIAM SPANN - RECORD VOLUME III, 188-191] Cont.

A I remember the name. I don't recall a complaint.

Q When was Mr. Burks promoted to area supervisor?

A I don't know.

Q Was it before or after Ms. McClain made her complaint in 1993?

A As best I can remember, he had just been made supervisor around that time, but I really don't know.

Q Is it a fact that nothing happened to Mr. Burkes at that time? He wasn't given any reprimand by the company at that time?

A No, sir, not at all.

Q After these complaints were made, he was taken out of his position; is that correct?

A Well, no, not necessarily.

Q Well, what happened to him?

A After those complaints were made - - these complaints, the letters - - and I think there's something we need to understand. There's more than just complaints. We had a couple of folks that worked in Dwayne's area that had resigned from the company, that felt that they were owed some money, and they sent these letters asking for, and, in some cases, demanding payment. One of the individuals that sent a letter had previously talked to me on two occasions about receiving the money. I did visit with the president of the lending corporation about that, and his request was denied. I communicated that back to him, said, sorry, we're not going to pay this, it's not due you. And that was the initial thrust of these letters.

Also, contained within those letters are comments of Dwayne Burkes. I

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[WILLIAM SPANN - RECORD VOLUME III, 188-191]
Cont. (1)

know, in Jeff's case, because he told me - - well, sorry.

THE COURT: I think the witness caught himself. Go ahead.

A I do know that Jeff was not - - when he presented his letter to me, there was more to it than just Dwayne Burkes' situation. But what was done, to directly answer your question, I bundled these letters, sent them to Mark McKinney, who was the regional manager for Dwayne Burkes. I faxed them to Dwayne Burkes, and my instructions to Dwane were, what's going on. My instructions to Mark were very simple, what's going on, look into this, and see what you come up with.

BY MR. STEWART:

Q But he stayed with the company at that time; did he not?

A Yes, sir.

Q He wasn't terminated?

A No, sir.

Q And, yet, these letters indicated abusive behavior on his part, to the point where he was humiliating employees; do they not?

A Yes, sir.

Q Using mean and vulgar language to those employee?

A Yes, sir.

Q Doing the same thing to employees in front of other employees.

A Yes, sir.

Q And being rude to customers?

***

[WILLIAM SPANN - RECORD VOLUME III, 188-191]
Cont. (2)

A Yes, sir.

***

[WILLIAM SPANN - RECORD VOLUME III, 189]

Q When was Mr. Burks promoted to area supervisor?

A I don't know.

Q Was it before or after Ms. McClain made her complaint in 1993?

A As best I can remember, he had just been made supervisor around that time, but I really don't know.

***

[WILLIAM SPANN - RECORD VOLUME III, 179]

Q Well, was he aware of what you were going to do about putting together this personnel policies and procedures manual?

A Only - - not to any extent other than when I initially went to work there. I told him there were a number of things that I thought we needed to do. I sat down and visited with about them, and that happened to be included in there, but that was really the only time, other than when I would go to him for approval of the actual policy manual that he was really involved in it.

***

[LINDSAY SEALS - RECORD VOLUME IV, 28-30]

Q And here is the Credit Insurance. And I assume that's the department we're talking about, That Mr. Wyvill was in Charge of; is that correct?

A Yes.

Q And then Margaret Moon was down here. And one would understand the structure to mean that she was the person who was responsible for this particular - - supervisor of this particular department.

A Yes.

Q And you've indicated that Ms. Moon's work became a little heavier after Mr. Wyvill left. That's correct; isn't it?

A Yes.

Q And that's because, in addition to her other duties, she continued to have to supervise; is that not correct?

A This chart, by virtue of the fact that Ms. Kennedy is head of the administration, was prepared sometime after I was no longer in charge of that division.

Q I understand.

A So, whether or not Margaret Moon had supervisory duties at the time that chart was printed, I would not know.

Q Well, in common, everyday language I would assume that supervisor would mean that she has a supervisory role. Would you not agree with that, Mr. Seals?

A Yes, sir, I would agree with that.

Q And that would indicate she had taken some kind of leadership role over other people?

***

[LINDSAY SEALS - RECORD VOLUME IV, 28-30] Cont.

A I would agree with that.

Q And there were other people in that department; is that correct?

A Yes.

Q And her work continued in '94 and '95?

A That's correct.

Q Ms. Moon is younger than Ridgley; isn't she?

A Yes.

Q And was at the time he was terminated?

A Yes.

***

[GARY WARRINGTON - RECORD VOLUME I, 55-56]

Q And we're Not talking about a mere trainee; are we, Mr. Warrington?

A I think we are.

Q Well, did he meet with you and Mr. Seals on a regular basis?

A He did.

Q And did he provide you, actually, with reports that had been done by people who had other jobs to do on a day-to-day basis in the Life company?

A He didn't prepare any formal reports, that he submitted to me.

Q Did he not talk to you, Mr. Warrington, at some time, about a report that he and Michelle Barnett had prepared?

A There was some discussion about a report. There was no formal report for recommendations, other than a discussion about a possible or potential change in procedure on a certain issue.

Q Did you all change it?

A We discussed changing it. Eventually, we made some modifications, but we didn't change it in total concurrence with what he had indicated that we should.

***

[WILLIAM SPANN - RECORD VOLUME IV, 125]

Q All Right. Let me ask you this, Mr. Spann, about another matter that you mentioned in your testimony here today. You testified about having a conversation with Mr. Ridgley Wyvill and Terrell Brown after the termination.

A Yes, sir.

Q And then you and Mr. Brown Talked after Ridgley left?

A Yes, we did.

Q You mentioned that you all talked about possibly offering him $5,000.

A Yes, sir.

***

[TERRELL BROWN, JR. (TEE) - RECORD VOLUME IV, 134]

Q Now, at some point, Mr. Wyvill Talked to you about his findings of the "UN-LINK"?

A Well, he came and gave me two pieces of paper, and at that time indicated that he found some information about the Chattanooga issue, and gave that to me at that point.

***

[TERRELL BROWN, JR. - RECORD VOLUME IV, 153]

A Not after I had a conversation with my father. I told my father of my involment, and that was not the reasons for his termination.

***

[LINDSAY SEALS - RECORD VOLUME IV, 30-31]

Q Now, back to "Tee" Brown. You have indicated to the Ladies and the Gentlemaa on the jury that he was a trainee, a mere trainee there in the Life company. Is that what your testimony was?

A That is my testimony.

Q Did he meet, from time to time, with you and Mr. Warrington and Mr. Seals?

A Yes, he did.

Q Did he bring you, from time to time, certain proposals he had worked on with people in the Life company?

A He was instructed to make a report each time he finished with a unit or a group. He made a report on what he had found; basically, critiqued his stay in the department.

Q And as a result of some of his reports, did you all take certain actions and make certain changes in the Life division of United Companies from time to time?

A That's conceivable.

Q Was there some occasion, before you met in this particular room on that date, with Mr. Wyvill and all those other people, when he was terminated, that Mr. "Tee" Brown came to you and came to Mr. Seals, and discussed with you a credit life report that indicated how that particular department could make money for the life insurance company?

A I don't recall such a report. We did have a discussion about the department.

Q With "Tee" Brown?

A With "Tee" Brown. And I don't recall that report in detail, to answer your question accurately. But I did meet with "Tee" Brown. And I don't recall that report in detail, to

***

[LINDSAY SEALS - RECORD VOLUME IV, 30-31] Cont.

answer your question accurately. But I did meet with "Tee" Brown about his stay in the credit insurance department.

***

[SANDY STAFFORD - RECORD VOLUME V, 84]

Q Initially when you came back were you permitted to have a flexible schedule?

A Yes.

***

[CHERYL WELCH - RECORD VOLUME V, 103 - 104]

BY THE WITNESS:

A "I told Gerald why I was leaving was because I only worked part time and I felt like I was having to do as much as I did whenever I was there full-time. I was having a hard time getting it all done. And then the pay. I think I did mention the pay to him. Then I mentioned his cussing and hollering, getting angry so easily.

BY MR. STEWART:

Q So, you do recall at that particular time mentioning to him that difficulty you had in getting work done?

A Well, that's been five years so I - -

Q I understand.

***

[CHERLY WELCH - RECORD VOLUME V, 98]

Q Tell me if you would if Mr. Waldrop didn't work an arrangement out for you so you could work some hours around your children when you first started there?

A Yes, he did in the beginning. And then probably two months and he changed my hours.

Q You were working part-time and he made even that a flexible situation so you could take care of your children or your child?

A Yes, sir, he did. And he had told me and Sandy whatever hours we arranged, then he approved it.

Q Told both you and Sandy?

A Yes.

***

[SANDY STAFFORD - RECORD VOLUME V, 198 - 199]

Q And isn't it a fact that after Mr. Wyvill called you, you did go to see Gerald Waldrop and talk to him? It was after that time that you went out to see Gerald and talked to him about whether or not you should take this job or about his job and what you were going to do; is that not true?

A Yes.

***

[SANDY STAFFORD - RECORD VOLUME V, 204]

Q He shared his bonuses with you certainly didn't he?

A Yes.

***

[SANDY STAFFORD - RECORD VOLUME V, 206-208]

Q And he was fair with you and the other people in the office about that wasn't he?

A Yes, he was with mine. I'm not sure about everybody else but with mine he was.

Q You did not have any complaints about it did you?

A No.

Q And back to the bonuses, you never complained to anybody, D. C. Brantley, Joe Phillips or anybody about those bonuses did you?

A No.

Q In addition to rating you very high, he raised your salary considerably while you were there didn't he?

A I got annual raised like everyone else.

Q When you began working there, you were making about $1200.00 a month gross?

A Probably - - probably as a cashier. I started out around probably $700.00 or $800.00 but I got annual raises.

Q And at the time that Mr. Waldrop was fired you were making somewhere in the neighborhood of, what would you say, $2,500.00?

A Twenty-four ($2,400.00) - - $2,500.00 a month.

Q And you also had a company car?

A Yes.

Q Now, with the other people, Cheryl Welch and others in that office, as a practical matter he was fair with them in the same fashion that he was with you even to the point where he would give them flexible work hours; is that correct?

***

[SANDY STAFFORD - RECORD VOLUME V, 206-208]
Cont.

A Well, Cheryl was part-time so she - - her hours were just - - you know, her - - she had certain set hours because she was part-time. She - - that's what she agreed to when she came to work there.

Q And if you had some event that you had to attend or somebody else had to attend, he was kind to you in that regard, too, wasn't he?

A Yes, when I - - when I had children, you know, programs or something I would, you know. I would usually make up the time though.

Q But he was fair with you in letting you off to do that, wasn't he?

A Yes, which it - - I mean rarely did have to do it. I would take my lunch hour to do stuff like that and - - -

***

[SANDY STAFFORD - RECORD VOLUME V, 207]

Q And you also had a company car?

A Yes.

***

[SANDY STAFFORD - RECORD VOLUME V, 209]

BY MR. STEWART:

Q You knew the leave of absence that Gerald Took in 1991 was because of the fact that he had a health problem, didn't you?

A I mean I wasn't told. Like I said, I wasn't told why he was put on leave. I just know he was put on leave. I knew he had gotten a doctor to write something - - had a - - from his doctor saying, you know, about his hypertension and blood pressure or something on it. I saw that.

Q You were not aware of the fact that he had diabetes and took insulin?

A Yes, he was a - - yes, I knew he was a diabetic.

***

[SANDY STAFFORD - RECORD VOLUME V, 225-227]

Q Now, let's get to D. C. Brantley. Did you ever meet or see D. C. Brantley in his office or in your office down there, Ms. Stafford?

A Yes, when he came by our office.

Q And at any point in time after Mr. Waldrop came back from the leave of absence and you were experiencing these problems, did you ever tell D. C Brantley anything at all about the conversations or problems that you had in your office?

A I mean - - yes.

Q Was it on an occasion when Mr. Waldrop was out of the office?

A Well, he only came down maybe once a month, if that - - once or twice a month. Yes, I mean he'd come by and he'd say, "Well, how is Gerald? Is Gerald any better or whatever?" And I, you know, would say, "Well, maybe." So, we'd tell him what he - - you know, what he was doing and how he was doing.

Q Is it your testimony here today that you told Mr. D. C. Brantley in conversations with him after Mr. Waldrop came back from his leave of absence that Mr. Gerald Waldrop had been abusive to you and to the other ladies in the office?

A I mean we told him about his temper and how he - - he would cuss and rant and rave and, you know, those things.

Q So, you told him about the cussing, you told him about the ranting and raving as far as you ladies in the office were concerned; that is your testimony here today?

A That was, yes. Now, that was after Pam's call.

Q And did you also tell him on that occasion in that office there in Dalton,Georgia while

***

[SANDY STAFFORD - RECORD VOLUME V, 225-227]
Cont.

Mr. Waldrop was out, you also tell D C. Brantley that he had done the same thing to customers?

A I mean I may have told him on the phone. He didn't really come by that much. I mean if he did, we'd do -- he'd just come and say, hi, how are y'all, you know. Gerald was normally in the office when came. Maybe a time or two he wasn't.

Q But you are sure you told him however you told him?

A Yes.

Q You have no doubt about that?

A Yes, we told him.

***

[READING OF DEPOSITION OF D. C. BRANTLEY - RECORD VOLUME V, 317-318]

BY MS. GRIFFIN: "Now, let me ask you. You previously indicated in your deposition here today that you have not talked to Sandra Stafford about anything having to do with the abusive contact on the part of"

- - -

BY MR. STEWART: "No."

BY MS. GRIFFIN: "Nor any of the other employees that were in this office?"

BY MR. STEWART: "No."

BY MS. GRIFFIN: "Yet it is your understanding here today that those are the people who made complaints about Mr. Waldrop?"

BY MR. STEWART: "I still don't know."

BY MS. GRIFFIN: "That resulted in his termination?"

BY MR. STEWART: "I still to this day don't know who sent all the letters into the home office, no."

BY MS. GRIFFIN: "You don't have any idea who they were?"

BY MR. STEWART: "No, I sure don't and don't want to know."

***

[PAM MCMILLAN - RECORD VOLUME V, 290-292]

BY MR. STEWART:

Q Did you work at Fleet Mortgage Company?

A Yes, I did.

Q And did you start there in about '79?

A Yes, sir.

Q And you left them after awhile and you went from there to where, Barclays?

A No, I went to Richard Brock Insurance Agency.

Q Okay. And you stayed there for about six months didn't you?

A Yes, sir.

Q And you left because you were dissatisfied with that work; is that correct?

A I just didn't like that kind of work.

Q And you went to Barclays after that?

A Yes, I did.

Q And you left there; were you dissatisfied there about the way they managed that particular office?

A No, sir.

Q Now, what about Commercial Credit? You go there - - -

A I didn't go with Commercial Credit.

Q Did you work for - - -

A It was Barclays.

Q Barclays. Did you work for a Mr. Jack Rogers after that?

***

[PAM MCMILLAN - RECORD VOLUME V, 290-292] Cont.

A Yes, I did.

Q And that was a different outfit; is that right?

A No, Commercial Credit bought out Barclay Finance Company.

Q Okay. And you were dissatisfied when you left there were you not, because of the way that Mr. Jack Rogers ran that office; is that correct?

A No.

Q Is that not what you said in your deposition testimony?

A No.

Q Well, I - - - Where did you work after that?

A I went to United Companies.

Q All right. After you left United Companies, where did you work; an OB-GYN office?

A Dalton OB-GYN.

Q And how long did you work there?

A A year and a half.

Q And left there because you did not like the pressures of that job; is that not correct?

A And I had gotten into an income bracket that I could go to work part-time. I had a granddaughter that was down in Savannah or next to Savannah, Georgia of Fort Stewart and I wanted to go - - be able to go see her more often.

***

[PAM MCMILLAN - RECORD VOLUME V, 293-294]

Q Now, after you left that office, you planned to no longer go back there didn't you?

A Right.

Q And did not go back there?

A No.

Q Because you were physically afraid as you have told the ladies and gentlemen of the jury and this Court of Mr. Waldrop; you were just afraid of what he would do?

A Right.

Q And you were certainly more afraid of him after he was fired from United and found out that you perhaps might have had something to do with the firing, weren't you?

A That's exactly right.

Q Is that why you went over to his new office after he started that office and took your daughter and your new grandchild, Ms. McMillan, and introduced your grandchild to Gerald Waldrop?

A The day that I did that - - -

Q Is that why you did that because you were physically threatened of him; just yes or no?

A No. But the day that I did that I went because my granddaughter was born premature and she lived and I was proud of her. And I wanted the whole world to see her. And I wasn't as mad at Gerald. I still care about Gerald. I just didn't like what he did and the way he treated people. And, yes. I was afraid of him and that was a big mistake on my part. And as soon I got in that office he jumped me and he said, "I heard D. C. come to your house." He scared my daughter. And I have never stepped foot back in that place again.

***

[READING OF DEPOSITION OF D. C. BRANTLEY - RECORD VOLUME V, 314-315]

BY MS. GRIFFIN: "Tell me if you ever at any of your evaluations with Mr. Waldrop from 1988 - - March of '88 until the time that you learned of his termination in the Holiday Inn in Chattanooga, Tennessee, I guess in January - - January 24th of 1993, did you ever say anything at all about abusive language as to employees?"

BY MR. STEWART: "No."

BY MS. GRIFFIN: "Did you ever say anything about abusive treatment to employees?"

BY MR. STEWART: "No."

BY MS. GRIFFIN: "Now, Mr. Brantley, you had a good relationship with Ms. Stafford didn't you?"

BY MR. STEWART: "Yes, sir."

BY MS. GRIFFIN: "And you had a good relationship with the other ladies in the office didn't you?"

BY MR. STEWART: "Yes."

BY MS. GRIFFIN: "And they knew that you were - - and they knew you were from the time you began that process that you were Mr. Waldrop's supervisor."

BY MR. STEWART: "Yes."

BY MS. GRIFFIN: "And did they ever say anything to you about abusive language?"

BY MR. STEWART: "No."

BY MS. GRIFFIN: "Did they ever say anything about him abusing them?"

BY MR. STEWART: "No."

***

[READING OF DEPOSITION OF D. C. BRANTLEY - RECORD VOLUME V, 314-315] Cont.

BY MS. GRIFFIN: "Okay. So, this came as a surprise to you on - - on the date that you were there at the Holiday Inn; is that correct?"

BY MR. STEWART: "To a certain extent, yes. Of course, I knew you went down there for basically the same thing in October or November."

***

[READING OF DEPOSITION OF D. C. BRANTLEY - RECORD VOLUME V, 317-318]

BY MS. GRIFFIN: "Now, let me ask you. You previously indicated in your deposition here today that you have not talked to Sandra Stafford about anything having to do with the abusive contact on the part of"

- - -

BY MR. STEWART: "No."

BY MS. GRIFFIN: "Nor any of the other employees that were in this office?"

BY MR. STEWART: "No."

***

[PAM MCMILLAN, RECORD VOLUME V, 276]

A …office, after all of this ranting and raving and i ran to a phone and I go to the phone and I said, "I'm going to call D. C. Brantley." He was our supervisor. And I said, "I'm going to tell him I want a transfer." So, I got D. C. on the phone and he said, "Just sit tight and let me see what I can do." And – but Gerald was just so made about everything. But I proceeded to tell D. C. what he did and – and D. C. just I would assume checked it out.

***

[WILLIAM SPANN RECORD VOLUME IV, 112

BY MR STEWART:

Q WHAT EXACTLY WAS THE FORM DRAFTED THAT YOU AND – CAN YOU TELL THE LADIES AND GENTLEMEN OF THE JURY THE DATE?

A I BELIEVE IT WAS IN 1993.

A AND THAT FORM HAD A SPECIFIC REFERENCE IF AN EMPLOYEE WAS TERMINATED, THAT THEY WAIVED ANY CLAIM THEY MIGHT HAVE BEEN BASED ON AGE DISCRIMINATION?

A AND OTHER ACTS, YES, SIR.

Q AND YOU ALL DID THAT IN THE CONTEXT OF THIS CONCERN THAT WAS EXPRESSED BY MR. PHILLIPS TO YOU ABOUT THE POTENTIAL FOR SOMEBODY POSSIBLY SUING YOU AT THAT TIME?

A NO, THAT WASN'T THE CONTEXT. THE CONVERSATION I HAD WITH MR. PHILLIPS - I DON'T RECALL WHEN IT WAS, BUT I KNOW IT WAS YEARS BEFORE THAT. THE CONTEXT OF THE DEVELOPMENT OF THAT FORM IS, IF WE'RE GOING TO PROVIDE TO THE EMPLOYEES THAT ARE TERMINATING, VAST SUMS OF MONEY, THEN WE WANT TO HAVE SOME BALANCE IN THERE. WE WANT TO HAVE SOME PROTECTION, IF WE'RE GOING TO PROVIDE THEM WITH SOMETHING THAT WE DON'T OWE THEM. THAT WAS THE CONTEXT OF IT.

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JAN 4 2001
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No. 00-820

IN THE

Supreme Court of the United States

J.R. RIDGLEY WYVILL,

Petitioner,

v.

UNITED COMPANIES LIFE INSURANCE COMPANY, UNITED COMPANIES FINANCIAL CORPORATION and UNITED COMPANIES LENDING CORPORATION,

Respondents.

GERALD W. WALDROP,

Petitioner,

v.

UNITED COMPANIES FINANCIAL CORPORATION, UNITED COMPANIES MORTGAGE OF GEORGIA AND UNITED COMPANIES LENDING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

I. Whether the decision rendered below by the United States Court of Appeals for the Fifth Circuit abrogating the jury's verdict in favor of Petitioners under the Age Discrimination in Employment Act involves an important federal issue that conflicts with this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000).

STATEMENT PURSUANT TO RULE 29.6

United Companies Financial Corporation is the parent corporation of United Companies Lending Group, Inc. United Companies Mortgage of Georgia has been merged with United Companies Lending Corporation. United Companies Lending Corporation has been merged with United Companies Lending Group, Inc.

United Companies Financial Corporation formerly owned United Companies Life Insurance Company. Currently, the parent corporation of United Companies Life Insurance Company is ING America Insurance Holdings, Inc.

Of the Respondents and the foregoing parent corporations, only ING America Insurance Holdings, Inc. (which owns ten percent or more of the stock of United Companies Life Insurance Company) issues shares to the public.

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Respondents, United Companies Financial Corporation, United Companies Life Insurance Company, United Companies Mortgage of Georgia and United Companies Lending Corporation (collectively referred to as "United Companies") respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 212 F.3d 296 (5th Cir. 2000).

Respondents are mindful of this Court's admonition: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Nevertheless, that is precisely what Petitioners in this matter are asking this Court to do. In a feigned effort to transform this case into a matter worthy of certiorari, Petitioners cynically attempt to paint the Fifth Circuit as a renegade court, "steadfastly refus[ing]" to follow and "ignoring" the dictates of this Court in the realm of employment discrimination litigation. A more sober review of the Fifth Circuit's decision in this case, however, makes it clear that Petitioners are overreaching. While Respondents generally would not delve too deeply into the facts of a case in a brief in opposition to a petition for writ of certiorari, such a review is necessary here to establish the propriety of the Fifth Circuit's decision and concomitantly why a review by this Court is unnecessary.

STATEMENT OF THE CASE

I. Gerald Waldrop

During J.R. Ridgley Wyvill's and Gerald Waldrop's employment with United Companies[1], the Company employed approximately 2,700 workers and operated branch offices throughout the United States. Waldrop began working with United Companies in 1983 as branch manager in the Company's Dalton, Georgia branch office, and from 1991 until 1993, he

1. Respondent United Companies (through the Lending Corporation) principally provided mortgage loan products.

supervised four employees, Sandy Stafford (assistant manager), Pam McMillan, Cheryl Welch and Pat Little. Tr. Vol. I at 124-25, 152. Waldrop, in turn, was supervised by D. C. Brantley, who was two years older than Waldrop. Tr. Vol. I at 193, Vol. III at 184. Brantley reported to Joe Phillips. Tr. Vol. II at 144.

Over time, it became obvious that Brantley and Waldrop did not work well together. Tr. Vol. I at 164. In fact, on one occasion, Waldrop struck Brantley in the back of his head at a Company function. Tr. Vol. I at 164-66, 202-06, 256-58. On other occasions, Waldrop referred to Brantley, his supervisor, as a son-of-a-bitch; told Brantley that he would "whip his ass;" and threatened to "shut Brantley's mouth if he ever came to Dalton." Tr. Vol. I at 200-01; Brantley Dep. at 64, 66 ; Def. Wal. Ex. 6 (Tr. Vol. II at 201-02). In early 1991, the Company terminated the employment of Waldrop's son, Barry, which only exacerbated Waldrop's hostility towards the Company and his supervisors. Tr. Vol. II at 195-97.

In addition to the problems Waldrop had with his supervisor, he also had difficulties with the Dalton office employees and customers. For instance, Waldrop often yelled and cursed at employees and customers and lost his temper on a daily basis. Tr. Vol. V at 145-56; 273-76; 85-87; Little Dep. at 24-27, 29, 64-65. It suffices to say that Waldrop's employees were extremely upset and frightened by this behavior. Tr. Vol. V at 152-53, 280-81, 89, 93; Little Dep. at 31, 51.

In early 1991, Brantley wrote a series of memoranda to Phillips detailing the problems that he experienced with Waldrop. Def. Wal. Ex. 4 (February 11, 1991) (Tr. Vol. II at 198-99); 5 (February 12, 1991) (Tr. Vol. II at 199-201); 6 (March 14, 1991) (Tr. Vol. II at 201-22); Tr. Vol. II at 198-202. In the March 14th memorandum, an exasperated Brantley pleaded:

> Mr. Phillips, I will no longer put up with being called a S.O.B., threatened, and being blamed for company

> changes. I am losing the respect of fellow employees by enduring Mr. Waldrop's insubordination. . . . I am requesting that I be relieved from supervision of Branch # 145 [Dalton] immediately.

Def. Wal. Ex. 6 (Tr. Vol. II at 201-02).

After reviewing the memoranda detailing the problems with Waldrop and discussing these problems directly with Brantley, Phillips provided the letters to William S. Spann, Jr., the Company's Director of Human Resources. Tr. Vol. III at 208, Vol. IV at 126. Subsequently, Spann and Phillips decided to place Waldrop on involuntary medical leave for a period of sixty days, after which time he could return to his position as manager of the Dalton office. Tr. Vol. II at 148-49, Vol. III at 224-25. Waldrop initially refused to accept the leave. Tr. Vol. II at 148-49, Vol. I at 218-20. Spann, Phillips and Brantley traveled to Dalton and informed Waldrop that he was required to take leave. Tr. Vol. II at 147-50, Vol. III at 224-26, Vol. I at 148-49, Vol. V at 158. Spann drafted a memorandum reflecting the reasons why Waldrop was placed on involuntary leave. Tr. Vol. IV at 116-17, 125-26; Vol. III at 224-25; Def. Wal. Ex. 11 (Tr. Vol. IV at 84). Phillips testified that the leave was necessitated by Waldrop's problems in the office and with his supervisor. Tr. Vol. II at 148-49, 206-07.

After his paid leave of absence, Waldrop resumed his duties, Tr. Vol. I at 151; Vol V. at 158-60, and his behavior worsened. Tr. Vol. V at 160, 274-76. Waldrop's employees pleaded with him to correct his behavior, but nothing changed. Tr. Vol. V at 159-61; Little Dep. at 35-37.

In September, 1991, Waldrop directed his anger at office worker Cheryl Welch by yelling at her and shaking a pencil in her face in front of his staff because she had made an account card error. Tr. Vol. V at 87-90, 275-76, Vol. I at 154-55. Welch was so upset that she broke down and cried. Tr. Vol. V at 88.

Subsequently, Stafford spoke with Spann about Waldrop's behavior. Tr. Vol. V at 163-65. Stafford said that the office employees were afraid of Waldrop. Tr. Vol. V at 163-65. A few weeks later, Waldrop told Stafford that he did not want employees in the office to laugh or talk. Tr. Vol. V at 167-68. When Stafford protested, Waldrop yelled that "If anybody don't like my attitude, they get [*sic*] hit the back door and I'll run this D-A-M [*sic*] place by myself. . ." Tr. Vol. V at 168. This outburst brought Stafford to tears. Tr. Vol. V at 168.

After these incidents had been brought to the attention of Spann and Phillips, Spann arranged for Waldrop to fly to the home office in Baton Rouge in November, 1991 for a formal reprimand. During this meeting, Spann informed Waldrop that further conduct of this nature would lead to termination. Tr. Vol. II at 150-51, Vol. III at 225, Def. Wal. Ex. 13 (Tr. Vol. IV at 84). After that meeting, Spann prepared a memorandum reflecting what had been discussed with Waldrop. Tr. Vol. IV at 84-88; Def. Wal. Ex. 13 (Tr. Vol. IV at 84).

Upon his return to Dalton, Waldrop called a meeting of his staff ostensibly to apologize to his employees as suggested by Spann during the counseling session. Tr. Vol. V 91-93, 168-70. Waldrop started the meeting by stating "I want to wish everyone a DAMN good morning." Tr. Vol. V at 91-93, 168-70; Def. Wal. Ex. 16 (Tr. Vol. V at 94-95). The tone of the meeting was sarcastic and "filled with retaliation" and soon after it, Waldrop resumed his abusive behavior towards his staff, customers, and others. Tr. Vol. V at 91-93; Def. Wal. Ex. 14 (Tr. Vol. V at 282-83) & 16 (Tr. Vol. V at 94-95); Tr. Vol. V at 92, 168-70. For example, in January, 1992, an elderly man came into the office and requested directions to an attorney's office. Tr. Vol. V at 90-91. For no apparent reason, when Waldrop heard this, he ran to the waiting room and shouted at the man, informing him that he would not give directions to him. Tr. Vol. V at 90-91. After McMillan gave directions to the man, Waldrop screamed at her for doing so.

Def. Wal. Ex. 17 (Tr. Vol. V at 95-96). Welch recorded the details of this incident in a memorandum. Def. Wal. Ex. 17 (Tr. Vol. V at 95-96).

In April, 1992, Spann learned that customers had complained about Waldrop's behavior. Tr. Vol. IV at 126-27. Specifically, Waldrop used abusive and inappropriate language towards customers Donna Hooper (Hooper Dep. at 7-15, 17-18), Kim Davis (Tr. Vol. V at 257-64) and Brenda Burgess (Tr. Vol. V at 241-49).

As a result of the continued abusive conduct and the belief that the Company had not done enough to control Waldrop's behavior, the Dalton staff began to leave United Companies. Tr. Vol. V at 89-90, 170-71, 173; Little Dep. at 31, 51-52. McMillan resigned in November, 1992 because she could no longer endure Waldrop's treatment. Tr. Vol. V at 281. Welch resigned shortly thereafter for the same reason. Tr. Vol. V at 93. Furthermore, both Stafford and Little were looking for work elsewhere. Vol. V at 89-90, 170-71, 173; Little Dep. at 31, 51-52.

After they resigned, McMillan and Welch sent letters to Spann complaining about Waldrop's behavior and explaining the reasons for their resignations. Tr. Vol. V at 93-96, 283-86; Def. Wal. Ex. 14 (Tr. Vol. V at 282-83), 15 (Tr. Vol. V at 282-83) & 16 (Tr. Vol. V at 94-95), 17 (Tr. Vol. V at 94-95). Upon receiving the letters, Spann called McMillan, Welch and Stafford. Tr. Vol. V at 172-74, 109-10, 285; Vol. IV at 88-89. Through his conversations with them, Spann discovered that Waldrop's behavior had not improved since the November, 1991 meeting and that Waldrop's employees actually feared for their safety because of his abusive treatment. Tr. Vol. V at 172-74, 109-10, 285; Vol. IV at 88-89; Little Dep. at 79.

Spann then discussed with Phillips the information he obtained about Waldrop's conduct, and they decided to terminate Waldrop's employment. Tr. Vol. IV at 88-91, 70. Although Spann

and Phillips notified Terrell Brown of their decision before they informed Waldrop, Brown was not otherwise involved in the decision to terminate Waldrop for his behavior. Because the Company was concerned with Waldrop's reaction to his termination, Spann, Phillips and Brantley met with him at a hotel in Tennessee. Tr. Vol. IV at 91-93. They instructed Waldrop's employees to change the door locks and close the office for the remainder of the day as a safety measure. Tr. Vol. IV at 92-94, Vol. V at 175-77; Little Dep. at 54-55. Waldrop was terminated for his abusive behavior on January 26, 1993. R. Vol. 9 at 1468 [Dkt. 183]; Tr. Vol. I at 113, 182.

II. J. R. Ridgley Wyvill

Wyvill worked for United Companies Life Insurance Company ("Life Company") in Baton Rouge until February 1, 1993 as the manager of the credit life department. Tr. Vol. II at 234-35; R. Vol. 9 at 1466 [Dkt. 183]. Wyvill's duties included coordinating and monitoring credit life insurance policies sold to customers and ensuring that the credit life staff maintained those policies. R. Vol. 9 at 1466 [Dkt. 183]. He was also responsible for supervising employees in this department, including Margaret Moon. Tr. Vol. II at 241, Vol. V at 22-23.

Wyvill reported to Lindsay Seals who was an executive vice-president of the Life Company. Tr. Vol. IV at 7, 36. Seals reported to Gary Warrington, the president of the Life Company. Tr. Vol. IV at 36.

In 1992, the Life Company made the decision to exit the credit life business and stopped issuing credit life insurance policies. Tr. Vol. V at 29; Vol. IV at 42-43; Vol. III at 58. Consequently, the workload of the department decreased steadily until it was ultimately disbanded altogether in 1994. Tr. Vol. IV at 42-43, 183-85; Vol. V at 29, 37.

Prior to Wyvill's termination, Seals had several discussions with Wyvill concerning his conduct and attitude towards

management. Tr. Vol. IV at 13. Despite these counseling sessions, in January 1993, Wyvill made several disruptive telephone calls to employees of the Lending Corporation (a separate and distinct division of United Companies). These calls centered on the Lending Corporation's termination of Waldrop and, ironically, ultimately led to Wyvill's termination.

The first call was made on January 29, 1993 to Carl Scott, a Lending Corporation branch manager in Nashville. Scott Dep. at 37-44. Scott had never met Wyvill before. Scott Dep. at 35, 56. Wyvill called Scott "out of the clear blue" and informed him that the Company "had gotten the Chief [Waldrop]." Scott Dep. at 37-44. Wyvill also told Scott to "watch his backside." Scott Dep. at 37-44. This telephone call upset Scott, who reported the incident to Joe Phillips, the Lending Corporation's senior vice-president in charge of loan production. Tr. Vol. II at 161-62, 218; Scott Dep. at 44, 48-49. Phillips requested that Scott prepare a memorandum setting forth exactly what had transpired during this conversation. Tr. Vol. II at 165. Def. Wyv. Ex. 19 (Tr. Vol. II at 216-17).

On the same day of the Scott call, Wyvill called Sandy Stafford, the assistant manager in the Lending Corporation's Dalton office where Waldrop had worked. Tr. Vol. V at 186-88. Like Scott, Stafford had never met Wyvill before and had only spoken to him on two previous occasions about credit life insurance during her nine years of employment. Tr. Vol. V at 184-85. Waldrop had been terminated three days before Wyvill called Stafford. Tr. Vol. V at 186.

Wyvill asked Stafford a number of questions concerning the circumstances surrounding the termination of Waldrop and warned Stafford (who was being considered to replace Waldrop as branch manager [Tr. Vol. V at 177-78]) that if she accepted the position, she would be taking "blood money." Tr. Vol. V at 186-88. Wyvill said nothing to Stafford about an alleged investigation of the UnLink, an anonymous newsletter which had been critical of United Companies management. Tr. Vol. V

at 187. Stafford was extremely upset by the call. Tr. Vol. V at 177-78, 187.

Shortly after receiving Scott's report, Phillips checked the telephone records of calls made from Wyvill's office, Tr. Vol. II at 164-65, 218; Def. Wyv. Ex. 18 (Tr. Vol. II at 218-19), and discovered that Wyvill had placed calls to a number of former employees who had been terminated or who had left under unpleasant circumstances, including Waldrop. Tr. Vol. II at 220; Vol. IV at 9; Def. Wyv. Ex. 18 (Tr. Vol. II at 218-19); Dep. of Callihan at 26-28. The records also reflected that Wyvill had called the Nashville and Dalton branches after Waldrop's termination. Def. Wyv. Ex. 18 (Tr. Vol. II at 218-19); Dep. of Callihan at 26-28.

Phillips notified Spann about Wyvill's calls. Tr. Vol. IV at 77-78. Spann and Roger Clark (the president of the Lending Corporation) called Stafford, and she told them what Wyvill had said to her. Tr. Vol. IV at 77-78. Tr. Vol. V at 189-90, 194. Following this, a meeting was held which was attended by Phillips (age 45), Spann (age 47), Terrell Brown, Sr. (age 53), United Companies Financial Corporation's chairman and chief executive officer, Roger Clark (age 46), Gary Warrington (age 53), Lindsay Seals (age 58), Daniel Callihan (age 39), regional vice-president of the Lending Corporation, and Wyvill. Tr. Vol. IV at 9-13, 37-40, Vol. II at 168; Callihan Dep. at 24, 27-28. Wyvill was questioned about the telephone calls, particularly the ones made to Stafford and Scott. Tr. Vol. II at 221; Vol. III at 167. At no time during this meeting did Wyvill state that anyone in the Company had authorized him to place these calls, nor did he offer any explanation for them. Tr. Vol. IV at 41, 12-13, 79-80, 37-40.

Based on this, Seals and Warrington decided to terminate Wyvill with the consent of everyone at the meeting. Tr. Vol. IV at 10-12, 16-17, 40-42, Tr. Vol. IV at 79-81, 71; Vol. II at 223; Vol. III at 131-33, 167-169. Wyvill was terminated effective February 1, 1993.

Because the Life Company was down-sizing at about the time of Wyvill's termination, his position was eliminated and his job duties were assumed by other employees. Tr. Vol. IV at 15-16, 58, 183. On February 19, 1993, the Life Company experienced a reduction-in-force that resulted in the terminations of approximately fifteen percent of its workforce. Tr. Vol. IV at 40-41, 43-44. Had Wyvill not been terminated on February 1, 1993, he unquestionably would have been terminated as part of the reduction-in-force. Tr. Vol. IV at 40-45, 81.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

I. Gerald Waldrop

Following his termination, Waldrop filed a Complaint alleging federal disability and age discrimination against his former employer, United Companies Mortgage of Georgia, and its parent, United Companies Financial Corporation. R. Vol. 2 at 280-87 [Dkt. 1]. United Companies filed a Motion for Summary Judgment requesting the dismissal of Waldrop's claims, R. Vol. 18 at 16-140 [Dkt. 43, 44], which was initially granted by the district court. R. Vol. 18 at 6-12 [Dkt. 46].

Subsequently, Waldrop filed a Motion for Reconsideration and provided what he claimed was "newly discovered" evidence. The district court, despite the high standard for relief under Fed. R. Civ. P. 60(b), granted Waldrop's Motion for Reconsideration and vacated the summary judgment with regard to the age discrimination claim. R. Vol. 8 at 1561-71 [Dkt. 157].

II. J. R. Ridgley Wyvill

Wyvill filed a similar lawsuit against United Companies Financial Corporation and United Companies Life Insurance Company, alleging violations of federal and state age and disability discrimination statutes as well as claims of intentional infliction of emotional distress and violations of federal and state securities laws. R. Vol. 1 at 2730-40 [Dkt. 1].

United Companies again filed a Motion for Summary Judgment, R. Vol. 3 at 2368-2535 [Dkt. 61], and the district court dismissed Wyvill's federal disability discrimination claim, his state discrimination claims, and his claims under securities laws. R. Vol. 8 at 1664-74 [Dkt. 147]. The only claims that remained were Wyvill's federal age discrimination claim and his claim for intentional infliction of emotional distress. R. Vol. 8 at 1664-74 [Dkt. 147]

III. Consolidated Proceedings

The court-ordered consolidated claims of Wyvill and Waldrop originally proceeded to trial on October 28, 1996. R. Vol. 1 at 2581-2582, 2609-18 [Dkt. 34, 49]. R. Vol. 13 at 863-64 [Dkt. 262]. Prior to trial, United Companies filed a Motion in Limine seeking, *inter alia*, to preclude Wyvill and Waldrop from introducing "anecdotal" evidence presented by former employees who were not "similarly situated" to Wyvill or Waldrop and opinion evidence from witnesses concerning their belief that others in the 2,700-employee company were discriminated against because of their age. R. Vol. 12 at 1081-85 [Dkt. 233]. The district court denied United Companies' Motion in Limine in this regard. R. Vol. 13 at 912-16 [Dkt. 252].

The initial trial lasted only three days. On the morning immediately following the completion of Wyvill's and Waldrop's cases, their counsel requested a mistrial, which was granted by the district court. R. Vol. 13 at 854-58 [Dkt. 265, 267].

The second trial lasted six days. United Companies moved for Judgment as a Matter of Law at the close of Wyvill's and Waldrop's cases and then again before closing arguments were held. Tr. Vol. III at 244-50, Vol. VI at 3.

The jury concluded that Wyvill and Waldrop had been discriminated against on the basis of age and that the discrimination was willful. R. Vol. 16 at 440-41 [Dkt. 361].

The district court entered a money judgment in favor of Wyvill and Waldrop that included an award to Wyvill of $20,000 in front pay. R. Vol. 16 at 433-39 [Dkt. 362, 363].

United Companies filed a Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial and to Amend Judgment. R. Vol. 16 at 373-424 [Dkt. 368, 369]. The district court issued an Amended Judgment after denying most of the relief sought in the Motion. R. Vol. 19 at 11-22 [Dkt. 409], R. Vol. 19 at 9-10 [Dkt. 410]. Thereafter, United Companies filed a timely Notice of Appeal. R. Vol. 19 at 4-6 [Dkt. 413].

IV. Appeal

The appeal was multifaceted. First, United Companies contended that the verdicts finding age discrimination were not supported by substantial evidence and should be reversed. Specifically, the Company contended that it had unquestionably proven that the Wyvill and Waldrop terminations were caused by their improper and disruptive behavior and that the two did not present substantial evidence showing that these legitimate reasons were pretexts for discrimination.

Further, as already alluded to, United Companies argued that the district court erred in permitting Wyvill and Waldrop to parade a number of former employees to testify about their opinion that a "trend" existed at United Companies whereby older workers were replaced by younger workers. Specifically, the Company contended that Wyvill and Waldrop made no showing that these individuals were similarly situated to them and, as such, the evidence should not have been admitted and unfairly prejudiced United Companies by placing the Company in the untenable position of having to litigate employment decisions involving former employees who were not similarly situated to the two plaintiffs.

In the alternative, United Companies asked that the willfulness findings be reversed since there was no evidence

that United Companies considered the ages of Wyvill and Waldrop when making the termination decisions.

Finally, United Companies argued that Wyvill's back pay period should have been cut off on February 19, 1993 because of the Life Company's reduction-in-force in which Wyvill would have been terminated.

V. Decision of the Fifth Circuit Court of Appeals

On May 31, 2000, two weeks before this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), the Fifth Circuit Court of Appeals, remarking that "the district court allowed the plaintiffs to saturate the record with testimony pertaining to other employees in other branches of the company who held different positions under different supervisors and were terminated at different times," overturned the jury's verdict concluding instead that "neither Wyvill nor Waldrop produced sufficient evidence to allow a reasonable jury to infer that United Companies terminated them because of age." Petitioners' App. A at 2a.

On June 21, 2000, Wyvill and Waldrop filed a Petition for Rehearing En Banc which was denied on August 21, 2000. Petitioner's' App. C at 40a.

PETITIONERS' ERRONEOUS REPRESENTATIONS OF FACT

Failing to obtain a rehearing in this matter, Wyvill and Waldrop have filed this Petition for Writ of Certiorari. In an attempt to discredit the Fifth Circuit's decision, they make a number of factual assertions in their Petition which are inaccurate. While United Companies has responded to some of the factual misstatements by directing this Court's attention to the trial record in the Factual Background Section of this memorandum, there are other unsupported factual assertions which merit special consideration.

1. On page 4 of the Petition, Wyvill claims that he proved he was replaced by someone under forty years of age. However, the record is clear that Wyvill merely speculated that he had been replaced by thirty-three year old employee Margaret Moon. Tr. Vol. II at 241-42. In fact, there was no evidence that Moon was promoted to Wyvill's position. Moon testified that in 1989, approximately four years before Wyvill's termination, Wyvill (who had originally hired Moon) promoted her to supervisor. Tr. Vol. V at 23. When Wyvill was discharged in 1993, Moon did not receive a promotion or pay raise. Tr. Vol. V at 24-25. Further, she never assumed any of the managerial responsibilities that Wyvill had performed. Tr. Vol. V at 25. The only change in her job duties after Wyvill's termination was that the amount of her work increased slightly. Tr. Vol. V at 25-26. Seals, Warrington and Spann confirmed that Wyvill was not replaced by Moon and that Wyvill's duties were dispersed among different employees following his termination. Tr. Vol. IV at 15-17, 58; Tr. Vol. III at 218-20. Wyvill's failure of proof in this basic regard, coupled with his inability to show that similarly situated younger employees were treated better than he was, sufficed to justify judgment as a matter of law under the shifting burden analysis in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *See Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 149-50 (5th Cir. 1995) (judgment entered notwithstanding jury verdict because the plaintiff could not demonstrate that he had been replaced by someone younger; the employer's contention that the plaintiff's position was simply eliminated was supported by substantial evidence); *Fields v. J. C. Penney Co., Inc.*, 968 F.2d 533, 537-38 (5th Cir. 1992) (judgment notwithstanding verdict of age discrimination granted where the plaintiff failed to demonstrate that he was replaced by someone younger than him). *See also*

Lilley v. BTM Corp., 958 F.2d 746, 752 (6th Cir. 1992) (district court's denial of motion for judgment notwithstanding jury verdict finding age discrimination was reversed; the plaintiff could not show that he was replaced by someone younger even though his work duties were distributed among remaining workers in the department and the employer hired a younger replacement only nine months after his termination).

2. In various parts of the Petition, Waldrop claims that the jury's verdict of illegal age discrimination is supported by the deposition testimony of Brantley in which he states that he did not receive the complaints lodged by Stafford, McMillan, Little and Welch about Waldrop's behavior. Tr. Vol. V at 312-19. Waldrop, however, does not present any evidence contradicting the numerous conversations that Spann had with these employees about Waldrop's abusive behavior. Waldrop inexplicably assumes that because Brantley stated that he was unaware of the complaints from Stafford, McMillan, Welch and Little regarding Waldrop's conduct, that somehow they were not made and are thus part of United Companies' purported scheme to cover its illicit motivation. At a minimum, the uncontradicted testimony demonstrates, however, that Spann, in his capacity as the director of human resources, was told about Waldrop's erratic and troubling behavior by Stafford and later by McMillan and Welch in their letters to him following their resignations.

3. In support of his position that he offered sufficient evidence to establish pretext, Wyvill does not claim that he did not make the calls he was ultimately terminated for; rather, he asserts that the calls were actually authorized by Tee Brown, the son of former United Companies' CEO, Terrell Brown, Sr.

Specifically, Wyvill claims that Tee Brown asked him to make the calls for the purpose of investigating the "Unlink," an underground newspaper published by employees of United Companies, critical of the entity. There are a host of uncontradicted facts, however, which conclusively rebut this claim.[2] To begin with, Wyvill decided not to notify his supervisors, or Brown, Sr., about the full-scale UnLink investigation that he allegedly made at the request of a manager trainee, even though such an investigation went far beyond the scope of his regular duties. Tr. Vol. III at 37-39, 56. Also, there is no connection between Wyvill's conversation with Carl Scott and the UnLink. Scott's testimony concerning the substance of the telephone conversation is unrebutted — Wyvill called him "out of the blue," informed him of the termination of Waldrop, and warned him that his job was in jeopardy and to "watch his backside." Scott Dep. at 37-44; Tr. Vol. III at 41-45; Def. Wyv. Ex. 19 (Tr. Vol. II at 216-17). There was no mention of the UnLink. Scott Dep. at 37-44; Def. Wyv. Ex. 19 (Tr. Vol. II at 216-17). The same is true regarding his conversation with Stafford. Wyvill admits to calling Stafford about her accepting the Company's offer of the branch manager position that had previously been held by Waldrop. Tr. Vol. III at 13-14. Although Wyvill disputes who initiated the call and what was discussed during the call, he admitted that he discussed the termination of Waldrop with Stafford. Tr. Vol. III at 13-14, 48-49. At trial, Wyvill testified that he implied to Stafford that the reason she was offered the branch manager position was to humiliate Waldrop. Tr. Vol. III at 13. Wyvill did not produce any evidence

2. Tee Brown, who was working as a trainee in the Life Company at the time, confirmed general discussions about an article appearing in the UnLink with Wyvill, but never asked him to conduct any type of investigation (much less make threatening telephone calls to Lending Corporation employees). Tr. Vol. IV at 131-37.

contradicting testimony regarding how upset Stafford became after receiving his call. Moreover, he did not contradict testimony that management called Stafford after the review of Wyvill's telephone records to inquire about the nature of their discussion. Wyvill presented no motive as to why Stafford would fabricate her version of the telephone call. Also, telephone records obtained by Phillips showed that Wyvill placed a number of calls to former employees. Def. Wyv. Ex. 18 (Tr. Vol. II at 218-19). Some of these worked for competitors and others had been terminated under extremely difficult circumstances, including Waldrop, who had been terminated just a few days before. Wyvill admitted making all of these calls. Tr. Vol. III at 50-52. After this information had been gathered, officials from both the Lending Corporation and the Life Company met to discuss Wyvill's misconduct. When summoned to the meeting, Wyvill failed to provide an adequate excuse for what he had done. He could have stated that he did what he did because he felt that he had been directed to do so by Tee Brown, but he did not. Tr. Vol. III at 11, 50-52, 55.

4. In an effort to establish disparate treatment, Waldrop attempted to show that someone younger than him, Dwayne Burks, did what Waldrop did and was treated more favorably. Since the circumstances surrounding Waldrop's and Burks' situations are entirely different, the Fifth Circuit gave the comparison little evidentiary credence. One difference involves the decision-makers involved in each of the decisions. Waldrop was terminated by Spann and Phillips in early 1993. On the other hand, Burks was demoted and removed from supervision by the president of the Lending Corporation, G. G. Hargon, in the fall of 1996. Tr. Vol. IV at 97-99. Hargon was not even employed by United Companies when Waldrop was terminated;

Roger Clark was the president of the Lending Corporation at that time. Tr. Vol. IV at 95, Vol. V at 51. Also, Waldrop had a four-year history of failing to get along with his supervisors, co-workers and customers. Burks did not have a similar history of incidents involving supervisors and customers that had been reported to the Company. Tr. Vol. IV at 95-100, Vol. V at 65-69. Additionally, Burks was an area supervisor in North Carolina and was responsible for seven branches in North Carolina, South Carolina and Virginia — a position different than the branch manager position held by Waldrop in Georgia. Tr. Vol. II at 24-25. Further, Burks was supervised by Mark McKinney who never supervised Waldrop. Tr. Vol. IV at 94; Vol. II at 11. Even assuming that the circumstances involving Waldrop and Burks are "nearly identical," Waldrop was treated better than Burks. Waldrop was given several chances to correct his behavior before his termination, including a paid leave of absence for a short and specified duration, after which he was allowed to return to his manager position. Burks was never given the opportunity to return to his area supervisor position and ultimately resigned during his indefinite leave. Tr. Vol. IV at 98-100. Finally, United Companies objects to the suggestion made by Petitioners to the effect that the evidence in the record indicates that more than twenty-five employees left United Companies because of Burks' bad behavior. Petition at 13. There is no evidence in the record that twenty-five employees resigned from United Companies because of Burks' behavior. When attempting to testify in this regard, Petitioners' witness, Sandra Moore, admitted that she was speculating as to the reasons why employees had left the Company. The district court sustained United Companies' objection and refused to allow Moore to speculate about the reasons why employees left United Companies.

Tr. Vol. II at 20. Incredibly, Petitioners selectively cite to Moore's testimony in the Appendix (App. F 154a) to the Petition for Writ of Certiorari and completely omit the ruling made by the district court on United Companies' objection. United Companies refers the Court to the complete record excerpt in the attached Appendix. App. at 1 (Tr. Vol. II at 20).

REASONS FOR DENYING THE WRIT

I. THIS COURT'S DECISION IN *REEVES*

In *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), this Court addressed the issue of "whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action." *Id.* at 2103. As the Second Circuit recently pointed out, this Court's "answer to this question cannot be reduced to a simple 'Yes' or 'No.' " *Schnabel v. Abramson*, 232 F.3d 83, 89 (2nd Cir. 2000). Rather, as this Court explained:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. *In appropriate circumstances*, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt . . . Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, *may*

> *permit* the trier of fact to conclude that the employer unlawfully discriminated.

120 S. Ct. at 2108-09 (emphasis added) (internal citations and quotation marks omitted).

The decision in *Reeves* "did not categorically conclude that a prima facie case plus pretext evidence 'permits' a trier of fact to find that a plaintiff has satisfied his ultimate burden; it noted, instead, that such circumstances 'may permit' a trier of fact to conclude that a plaintiff had met his ultimate burden." *Schnabel*, 232 F.3d at 89.

To that end, this Court in *Reeves* explained:

> This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law . . . if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontraverted evidence that no discrimination had occurred. To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review . . .
>
> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and

> that properly may be considered on a motion for judgment as a matter of law."

Id. at 2109 (internal citations and quotation marks omitted).

Applying those principles to the facts of the *Reeves* case, this Court concluded that the Fifth Circuit erred and that the employer "was not entitled to judgment as a matter of law." *Id.* at 2110. In support of that finding, this Court noted that the plaintiff established his prima facie case and offered sufficient evidence of pretext. The plaintiff also offered additional evidence that the person principally responsible for his termination (Powe Chesnut) was "motivated by age-based animus." *Id.* at 2110. Specifically, this Court cited the following — (1) Chesnut told the plaintiff that he "was so old [he] must have come over on the Mayflower;" (2) when the plaintiff was having difficulty starting a machine, Chesnut told him that he "was too damn old to do [his] job;" (3) Chesnut would regularly curse at Plaintiff and shake his finger in his face; (4) a coworker (Joe Oswalt), who was 24 years younger than the plaintiff, corroborated that there was an "obvious difference" in how Chesnut treated them; (5) the plaintiff offered evidence that he and Oswalt had nearly identical rates of productivity yet only the plaintiff's line was subjected to an efficiency study and only the plaintiff was placed on probation (Chesnut made both the decision to conduct the study of the plaintiff's line and to suspend him); and (6) the employer, which allegedly terminated the plaintiff for falsifying records, offered no evidence of falsification. *Id.* at 2110-2111.

II. PETITIONERS' CRITIQUE OF THE FIFTH CIRCUIT'S DECISION HERE IS UNAVAILING.

In suggesting that the Fifth Circuit's decision here is erroneous, Petitioners rely on two primary premises: (1) "in reaching its decision, the Fifth Circuit impermissibly ignored or dismissed as irrelevant virtually all of Petitioners' evidence," and (2) "in direct contravention of this Court's decision in *Reeves*, the Fifth Circuit again misconceived

Petitioners' burden of proof, holding that the proof of their prima facie case, and their evidence rebutting the validity of United Companies' proffered explanations for them, was not sufficient to support their age discrimination claims." Petition for Writ of Certiorari at 21 and 22. As illustrated below, neither assertion has merit.

A. Ignoring Evidence

Petitioners contend that the Fifth Circuit impermissibly ignored their evidence in several respects:

1. Anecdotal Testimony Regarding Other Employees

First, they note that the Fifth Circuit "held that the district court abused its discretion by allowing into evidence 'anecdotal testimony from and about other employees' who were fired after Terrell Brown made his so-called 'stray remarks' . . ." Petition for Writ of Certiorari at 14. Clearly, the Fifth Circuit did not err in this regard. Furthermore, this Court's decision in *Reeves* is completely inapplicable to the evidentiary issues decided by the Fifth Circuit in this case. Importantly, Petitioners do not cite any Supreme Court authority or any conflicting authority from any other Circuit that would satisfy the high threshold warranting a writ of certiorari to review the Fifth Circuit's ruling on the irrelevant anecdotal evidence.

As mentioned above, prior to the October 1996 trial, United Companies filed a Motion in Limine seeking to exclude evidence of alleged age discrimination from and about former employees who were not similarly situated to Wyvill and Waldrop on the grounds that it was irrelevant, unfairly prejudicial and likely to mislead the jury. R. Vol. 12 at 1081-85 [Dkt. 233]. The district court denied the Motion and permitted a number of former employees to testify about their own circumstances even though they had no personal knowledge as to the reasons for the terminations of Wyvill and Waldrop and were not "similarly situated" to them. Also, many of Wyvill's and Waldrop's

witnesses as well as their counsel offered testimony and argument concerning a number of other employees who had left United Companies over a period spanning more than ten years and contended that this constituted evidence of age discrimination from which the jury could infer that Waldrop and Wyvill were terminated because of their age.

It is well established in the Fifth Circuit that testimony of a former employee in an individual discrimination case is relevant and admissible only when the former employee has personal knowledge of the events surrounding the employment decision concerning the plaintiff or when the former employee was "similarly situated" to the plaintiff. *Goff v. Continental Oil Co.*, 678 F.2d 593, 596-97 (5th Cir. 1982); *Harpring v. Continental Oil Co.*, 628 F.2d 406, 409 (5th Cir.), *cert. denied*, 454 U.S. 891 (1981).

As the Fifth Circuit correctly noted here, introduction of other alleged discriminatory acts with no relation to the discrimination claimed by a plaintiff creates an unfair "trial within a trial" on issues that have little, if any, probative value.[3]

3. The facts of this case make it clear that concerns regarding "trials within the trial" are well founded. By allowing Wyvill and Waldrop to suggest to the jury that numerous former employees were discriminated against, the Company was forced to litigate all of these employment decisions, even though they had nothing to do with the terminations of Wyvill or Waldrop. For example, United Companies had to rebut the allegations of age discrimination raised by Garold Cooke (who worked as an area supervisor in Ohio for the Lending Corporation) by calling the individual (Mark McKinney) who made the decisions to demote and terminate Cooke because of unsatisfactory loan production. Tr. Vol. V at 48-64. Neither Waldrop nor Wyvill claimed that McKinney had anything to do with their terminations or ever supervised them. Because of the time constraints placed on the parties by the district court, United Companies could not present all of the documentary and testimonial evidence needed to explain the decisions to demote in the Fall of 1995 and later terminate Cooke in January, 1996 (almost three years after Wyvill and Waldrop's terminations). If the Company was

(Cont'd)

Sims v. Mulcahy, 902 F.2d 524, 531 (7th Cir.), *cert. denied*, 498 U.S. 897 (1990). The evidence was irrelevant, and even if it was relevant, it should have been excluded due to the unfair prejudice incurred by defendants. *Id.* at 530. *See also Harpring*, 628 F.2d at 410 (testimony of witness excluded "because it would involve trying another lawsuit within the existing lawsuit").

As indicated in *Goff* and *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1221 (5th Cir. 1995), employees are "similarly situated" when they work side by side with one another, hold similar employment positions and work under the same supervisors. *See Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988). Here, there is no doubt that the employees in question were not "similarly situated," and thus their testimony was not probative of discrimination and should have been excluded. *Haskell v. Kaman Corp.*, 743 F.2d 113, 120-22 (2nd Cir. 1984).

Specifically, the following witnesses testified at trial about their individualized beliefs that they were discriminated against by the Company, while at the same time admitting that they had no personal knowledge as to the reasons why Wyvill or Waldrop were terminated: James Davis, a former regional

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(Cont'd)
unable to respond fully to this one termination, it certainly could not respond to allegations made about the forty plus names recited by Wyvill's and Waldrop's counsel.

Another example of the unfair prejudice to United Companies is found in the repeated contention by Wyvill and Waldrop that a number of former employees who had worked for the Company for a long period of time (David Prejean, Gerald Langlois and Floyd Desormeaux) had been discriminated against by the Company on account of their age. Tr. Vol. II at 94-95, 97-99. United Companies was forced to call these witnesses (all of whom had retired voluntarily for different reasons) to testify so that they could explain to the jury they had not been discriminated against on account of their age. Tr. Vol. V at 10-15 (Langlois), 232-39 (Prejean) and 299-310 (Desormeaux).

vice-president for the Lending Corporation in Florida (Tr. Vol. II at 60-115); Garold Cooke, a former area supervisor in the Lending Corporation in Cincinnati (Tr. Vol. II at 28-59); Dennis Locklear, a former branch manager in Rome, Georgia who was demoted for low production in 1990 and then resigned (Tr. Vol. I at 259-92); and Floyd Desormeaux , a former vice-president in the Lending Corporation who retired at the age of sixty-two (Tr. Vol. V at 299-310). Incredibly, the district court allowed many of these witnesses (as well as Joe Phillips) to testify not only about their individualized experiences, but also about their belief that others in the Company were terminated because of their age.

Furthermore, the district court, over United Companies' strenuous objection, allowed counsel for Wyvill and Waldrop to question Spann and Brown, Sr. about the circumstances surrounding the employment and terminations of the following employees: Edward Andrews, Betty Ruth Axley, Ronnie Bryan, Neal Vickers, Gary Cochran, Bonnie Cox, Louis Craig, Michael Fowler, Bonnie Hathcock, Bill Hood, Kenneth Jernigan, James Kennedy, Davis McKenzie, Daniel Oakes, Jacques Pearson, Michael Shipley, Al Shiflett, and John Thudium. Tr. Vol. III at 230-234, 237-38 (limiting instructions), 238-241, 103-05, 115-16. Then, during closing arguments, counsel for Wyvill and Waldrop recited the names of forty-four former employees and claimed that these individuals (despite the lack of any evidence whatsoever) were discriminated against by United Companies because of their age. Tr. Vol. VI at 29-34. Further, counsel for Wyvill and Waldrop suggested to the jury that it could infer an adverse statistical significance from these numbers although no expert testimony was offered in this regard. Tr. Vol. VI at 31-32.

None of the former employees who testified or who were testified about were "similarly situated" to Wyvill. Not one of them worked in the Life Company where Wyvill worked. The Life Company was a separately incorporated entity having its

own management structure that was completely independent of the Lending Corporation where all of these employees worked. Further, none of the employees who testified or who were testified about reported to either Lindsey Seals or Gary Warrington like Wyvill. Additionally, no evidence was presented showing that these individuals were terminated under circumstances similar to those relating to Wyvill's termination.

Likewise, none of these former employees were "similarly situated" to Waldrop. None of them worked in the Lending Corporation as a branch manager supervised by D.C. Brantley and Joe Phillips at the time of Waldrop's termination in 1993. Further, Waldrop presented no evidence showing that any of these individuals were terminated under circumstances similar to those relating to Waldrop's termination.

Recognizing this, Wyvill and Waldrop now contend that this evidence was properly admitted to prove that a pattern and practice of age discrimination existed at the Company at the time of their terminations. However, none of this evidence constitutes admissible pattern and practice evidence.

The Fifth Circuit recently explained the circumstances under which "anecdotal" evidence could be used to prove an individual claim of age discrimination under a "pattern and practice" theory. In *Mooney*, *supra*, the plaintiffs sought to introduce at trial the testimony of ten "anecdotal" witnesses in support of their pattern and practice claim of age discrimination. 54 F.3d at 1220. The district court noted that the probative value of such evidence was outweighed by the "overwhelming difficulties" in allowing the evidence to be introduced. *Id.* at 1220-21.

The court in *Mooney* agreed with the district court that the plaintiffs were required to establish "that the proffered anecdotal witnesses were sufficiently similar to themselves so that the witnesses' testimony would have a tendency to show 'standard [discriminatory] operating procedure' and a 'regular rather than

unusual practice' of discrimination." 54 F.3d at 1221. The court further explained that:

> Testimony of anecdotal witnesses with different supervisors, working in different parts of the company was simply too attenuated to relate to this threshold issue.

Id. Because the evidence demonstrated "sporadic and isolated' circumstances, the court agreed that it was properly excluded. *Id. See also, Goff*, 678 F.2d at 597 (exclusion of former employees' testimony proper; evidence, even if admitted, insufficient as a matter of law to establish pattern and practice discrimination).

Here, the Fifth Circuit correctly concluded that the evidence offered by Wyvill and Waldrop did not rise to the level of admissible pattern and practice evidence. United Companies employed in excess of 2700 employees working throughout the country in a number of different divisions, and, as illustrated above, the "anecdotal" evidence introduced at trial involved a minuscule portion of the United Companies workforce and individuals who were not similarly situated to Wyvill and Waldrop. Accordingly, the Fifth Circuit's holding that the district court abused its discretion by allowing this evidence to be admitted into the record was entirely appropriate, and Petitioners did not refer this Court to a single case suggesting otherwise.

2. The Fig-Leaf Argument

Petitioners next contend that the Fifth Circuit dismissed Petitioners' evidence that Respondents' "supervisors violated their own standard employee disciplinary procedures in an effort to build a file on older workers which Respondents then used as a fig-leaf to cover any illegal employment actions." Petition for Writ of Certiorari at 14. The Fifth Circuit assumed that United Companies did not follow standard procedures in compiling disciplinary records on Wyvill and Waldrop (as it is required to

under Rule 50); however, the Court noted that it did not necessarily follow that in assessing the sufficiency of the evidence under Rule 50 such a fact standing alone evidenced age discrimination. In the words of the Fifth Circuit,

> there was no evidence . . . that United Companies kept files only on older workers, or that it complied with standard disciplinary procedures when filing reports on younger workers but flouted them when it came to Wyvill and Waldrop. Nor was there evidence that United Companies faithfully recorded the disciplinary violations of younger workers but fabricated those which, according to United Companies, motivated the terminations of Wyvill and Waldrop . . .In the absence of any nexus between plaintiffs' allegation of file-building and their ages, such assertions are insufficient to create an inference that plaintiffs were fired on account of age.

Petitioners' App. A at 19a.

In other words, while Petitioners offered evidence that United Companies failed to comply with their own standard disciplinary procedure, there was no evidence that this failure was used as a fig leaf to cover illegal employment actions as now argued by Petitioners.

3. Stray Remarks.

Petitioners also argue that the Fifth Circuit impermissibly discounted the weight of the so-called age-based comments attributed to Brown, Sr. Contrary to Petitioners' assertion, *Reeves* does not conflict with the Fifth Circuit's decision here in this regard. In *Reeves*, the statements at issue were made by the decision-maker about the plaintiff. Here, the comments that Petitioners claim were made by Brown, Sr. had nothing whatsoever to do with Petitioners themselves. Furthermore, such statements are even further irrelevant with respect to Waldrop's

claim because Brown, Sr. was not a decision-maker concerning his termination. Finally, the timing of the alleged statements was attenuated from the actual terminations of Petitioners.

B. Misapplying Legal Precedent

The only legal issue before this Court is Petitioners' claim that the Fifth Circuit's ruling is contrary to this Court's decision in *Reeves* because the Fifth Circuit purportedly held that Petitioners' proof of their prima facie case, along with their evidence rebutting the validity of United Companies' proffered explanations, was insufficient to support their age discrimination claims. This contention is subject to attack on at least two bases.

First, this case, at least the claim of Wyvill, does not conflict with *Reeves* because Wyvill never established his prima facie case of age discrimination. United Companies urged the Fifth Circuit to reverse the verdict because Wyvill did not establish a prima facie case.[4] The Fifth Circuit held that "because this case has been fully tried on the merits, we 'need not address the sufficiency of [plaintiffs'] prima facie case . . ." Petitioners' App. A at 9a citing, *Atkin v. Lincoln Property Co.*, 991 F.2d 268, 271 (5th Cir. 1993). Indeed, it was Petitioners, in an attempt to scuttle Respondents' argument before the Fifth Circuit in this regard, who contended that "the plaintiff's prima facie case is no longer relevant." Appeal Brief of Petitioners at 10. Thus, Petitioners' argument that the Fifth Circuit held that a prima facie case plus pretext is insufficient as a matter of law to sustain a jury verdict is factually incorrect since, at a minimum, the lower court disregarded whether a prima facie case had been established in the first place.

More importantly, Petitioners' contention is also incorrect because it misapprehends this Court's ruling in *Reeves*. Assuming that the Fifth Circuit did find that the Petitioners had

4. In *Reeves*, this Court noted that "the strength of the plaintiff's prima facie case" is a factor to consider in assessing whether judgment as a matter of law is appropriate in a given case. *Id.* at 2109.

established their prima facie cases and provided sufficient evidence of pretext, *Reeves* does not establish a per se rule that judgment as a matter of law would be inappropriate. Rather, this Court held that such a showing would not always be adequate to sustain a jury's finding of liability and specifically noted that "if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontraverted evidence that no discrimination had occurred," Rule 50 relief would be appropriate. *Id.* at 2109. Respondents submit that this case clearly falls within that category.

Specifically, as discussed above and in the various memoranda filed with the Fifth Circuit, neither Petitioner had a particularly strong prima facie showing. In fact, there is a quite compelling argument that Wyvill did not even meet the de minimis burden of establishing his prima facie case. Similarly, Petitioners had very little, if any, evidence establishing that Respondents' explanations for their discharges were false. For instance, Petitioners do not contend that they did not commit the acts United Companies cited in support of their discharges, *i.e.*, there is an avalanche of unrebutted evidence establishing Waldrop's confrontations with co-workers, supervisors and customers and the fact that Wyvill made the calls which ultimately led to his termination. These facts combined with the complete absence of evidence comparing the Petitioners' treatment with that of similarly situated younger employees makes the Fifth Circuit's decision all the more compelling.

Finally, unlike the plaintiff in *Reeves*, Petitioners provided no evidence of age-biased comments directed at them by decisionmakers, nor did they present a single witness who could attest to their being subjected to discrimination on account of age. In sum, the Fifth Circuit correctly concluded that "neither Wyvill nor Waldrop produced sufficient evidence to allow a reasonable jury to infer that United Companies terminated them because of age" and its ultimate decision does not conflict with *Reeves*.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTED TRANSCRIPT OF PROCEEDINGS

SANDRA MOORE: TR. VOL. II AT 20

A. WELL, THE NORTH CHARLOTTE BRANCH ACTUALLY OPENED IN AUGUST OF 1990, SO FROM THEN UNTIL DECEMBER OF '95, IT WAS ACTUALLY A FOUR-AND-A-HALF-YEAR PERIOD, AND AT LEAST TWENTY-FIVE PEOPLE LEFT.

Q AND FROM YOU OWN PERSONAL KNOWLEDGE OF BEING IN THE BRANCH, DO YOU KNOW WHY THESE PEOPLE LEFT THE BRANCH?

A MANY OF THEM LEFT OUT OF FEAR, INTIMIDATION, OR DUE TO PERSONAL CONFLICTS WITH HIM.

MR. ZATKIS: OBJECTION, YOUR HONOR, TO THE EXTENT SHE'S REVEALING —

THE COURT: OBJECTION SUSTAINED. SHE CAN ONLY TESTIFY AS TO HER OWN KNOWLEDGE.

* * *

Appendix

MARGARET MOON: TR. VOL. V AT 24-26

Q. At the time that Mr. Wyvill left the company in February of 1993 were you promoted?

A. No.

Q. At that time did you assume the position of manager of the Credit Life Department?

A. No, basically nothing changed.

Q. Did you ever assume the manager position at any time in the Credit Life Department?

A. No.

Q. After Mr. Wyvill left, did you receive any kind of a raise?

A. No, sir.

Q. After Mr. Wyvill left, were you then in charge of the personnel responsibilities doing evaluations, those kind of things?

A. No, sir.

Q. Did you do any hiring and firing —

A. No.

Q. — of personnel after Mr. Wyvill left?

A. No, Sir.

Q. You need to just let me finish the question.

A. Okay, sure.

Q. I know you can kind of anticipate it but to keep the record clear. Describe for the jury how your job duties as supervisor changed after Mr. Wyvill left?

A. The duties didn't change. The — probably the amount of work I had to do increased a little bit because there was no one in that position any longer. So, I dealt a little bit more with the agents and the clients than I had previously.

Q. And who took over the management responsibilities after Mr. Wyvill left for the Credit Life Department?

A. Jim Pitchford.

* * *

LINDSAY SEALS: TR. VOL. IV AT 16

Q. WHEN MR. WYVILL WAS TERMINATED, WHO REPLACED HIM?

A. HIS DUTIES WAS SPREAD AMONG SEVERAL PEOPLE.

Q. HOW DID MS. MOON'S DUTIES CHANGE AFTER MR. WYVILL LEFT?

A. HER DUTIES DIDN'T CHANGE. SHE ASSUMED MORE WORK. SHE HAD MORE OF WHAT SHE WAS DOING TO DO, WITHOUT MR. WYVILL THERE.

Q. WHO ASSUMED THE SUPERVISORY OR MANAGERIAL RESPONSIBILITIES THAT MR. WYVILL HAD HAD WHEN HE WAS WORKING AT THE CREDIT LIFE DEPARTMENT?

A. JIM PITCHFORD.

Q. APPROXIMATELY HOW OLD WAS MR. PITCHFORD AT THE TIME?

A. MID-FIFTIES, FIFTY-SOMETHING. I DON'T REALLY KNOW.

* * *

WILLIAM SPANN: TR. VOL. IV AT 218

Q. YOU'VE HAD AN OPPORTUNITY TO LOOK AT THAT. DO YOU KNOW A MARGARET MOON?

A. I DO KNOW WHO MARGARET IS, YES.

Q. DO YOU KNOW THAT SHE WORKED IN THE CREDIT LIFE DEPARTMENT OF UNITED COMPANIES LIFE?

A. YES, SIR.

Q. DO YOU KNOW THAT AT THE TIME OF THE TERMINATION OF MR. WYVILL, SHE WAS HIS ASSISTANT?

A. I KNEW SHE WAS A SUPERVISOR IN THE CREDIT LIFE DEPARTMENT.

Q. AND WORKED UNDER MR. WYVILL?

A. I THINK SHE DID, YES, SIR.

Q. AFTERWARDS, SHE TOOK HIS POSITION, DID SHE NOT, AND MANAGED THE CREDIT LIFE DEPARTMENT AS IT CONTINUED THROUGH '94 AND '95?

A. NOT TO MY KNOWLEDGE, NO, SIR.

* * *

SANDRA STAFFORD: TR. VOL V AT 187

Q. What did Mr. Wyvill say to you during that telephone call?

A. Well, he called me and he said he wanted to know if they had offered me the job, Gerald's job. And I said, "Yes." And he said, "Well, why — why — why was he terminated?" I said, "Well, they didn't tell me that." I said, "They had told me that, you know, it happened." And he — he said, "Are you going to take the job?" And I said, "I don't know. I hadn't decided yet." And he said, "Well, you know if you do, it will be like taking blood money."

Q. How did you feel after he made that comment to you?

A It upset me. I went in my office, shut the door; I was crying.

Q. What did he talk to you in that telephone conversation about the Unlink?

A. Nothing.

* * *

RIDGELY WYVILL: TR. VOL. III at 50-51

Q. WHEN YOU WERE BROUGHT INTO THE MEETING WITH — I BELIEVE YOU SAID IT WAS A SMALL BOARDROOM AND MR. PHILLIPS AND SOME OTHER PEOPLE — WAS MR. PHILLIPS IN THE ROOM?

A. YES, SIR.

Q. WHILE YOU WERE IN THE MEETING, DID YOU DENY MAKING ANY OF THE PHONE CALLS YOU WERE ASKED ABOUT IN THAT MEETING?

A. NO, SIR.

Q. WERE YOU TOLD, IN THAT MEETING, THAT CARL SCOTT WAS UPSET ABOUT THE PHONE CALL YOU MADE TO HIM?

A. I DON'T KNOW IF IT WAS EXACTLY THOSE WORDS, BUT THEY MENTIONED CARL SCOTT, YES, SIR.

Q. DID THEY MENTION WORDS TO THE EFFECT THAT MR. SCOTT WAS UPSET ABOUT YOUR PHONE CALL?

A. I BELIEVE THEY SAID I WAS BATTERING BRANCH MANAGERS OVER HAPPENINGS IN TENNESSEE. THAT'S THE WAY i REMEMBER IT.

Q. WELL, WERE YOU TOLD, IN THAT MEETING, THAT YOU HAD CALLED SANDY STAFFORD AND GOTTEN HER SO UPSET THAT SHE WAS AFRAID TO TAKE THE BRANCH MANAGER POSITION?

A. YES.

Q. ALSO, DURING THAT MEETING THAT YOU HAD WITH MR. WARRINGTON AND MR. SEALS, YOUR SUPERVISOR, AND THESE OTHER FOLKS, YOU WERE ASKED ABOUT A NUMBER OF THE PHONE CALLS YOU HAD MADE, AND THEY SHOWED YOU A TELEPHONE LOG SHOWING SOME TELEPHONE CALLS YOU HAD MADE?

A. YES, SIR.

Q. YOU DIDN'T DENY MAKING ANY OF THOSE CALLS; DID YOU?

A. NO, SIR.

* * *

Appendix

WILLIAM SPANN: TR. VOL. IV AT 88-89

Q. WHAT TELEPHONE CALL DID YOU HAVE WITH MS. STAFFORD IN THAT SAME YEAR?

A. I HAD ONE FOLLOW-UP PHONE CALL WITH MS. STAFFORD IN EARLY JANUARY AFTER I HAD RECEIVED ANOTHER LETTER FROM AN EMPLOYEE, A FORMER EMPLOYEE, OF THE COMPANY, AND I ASKED HER, IS THIS REALLY — ARE THESE THINGS TRUE? IN YOUR BEST ESTIMATION, ARE THESE THINGS REALLY GOING ON, AND SHE SAID YES.

SANDRA STAFFORD: TR. VOL. V AT 163-165

Q. Now, you said that Mr. Spann placed this call to you?

A. Yes.

Q. You did not call Mr. Spann?

A. No.

Q. You did not call anyone in management at that time?

A. No.

Q. Did you have any idea why Mr. Spann was calling?

A. No, not until he called.

Q. What did you tell Mr. Spann about Ms. McMillan?

* * *

A. He just asked me, you know, if — if it was, you know, true about — you know, was she telling the truth and I said, "Yes."

Q. What did you tell Mr. Spann in that telephone call about what Mr. Waldrop was doing besides the incident with Ms. Welch?

A. Well, you know, I mean his changes of temper, you know, like exploding at customers and cussing, you know, getting ill with the customers, raising his voice at them, the language, you know, that we were scared he was going to hurt somebody or, you know, have a heart attack.

Q. How did you feel about your own safety at that point in time?

A. Well, I was afraid. I was afraid he was going to lose it because he would get so upset and clench his fists and shake and get real red faced and — and I mean it was scary.

Q. What did you say to Mr. Spann or someone else in management about how you felt the stability in the office was in terms of the staff?

A. Well, I mean I was afraid everybody was going to leave because of it.

Q. What did you tell Mr. Spann about your ability to continue to work at the company?

A. I — I told him — well, I mean I had been looking for a job myself and I — I — I told him that.

Q. Did you tell him why you were looking for a job?

A. Yes.

Appendix

PAM MCMILLAN: TR. VOL. V AT 281

Q. Why did you leave?

A. Because of Gerald.

Q. And specifically what about —

A. Because of his — the way he cussed the customers, the way he cussed us, the way he ranted and raved and he terrified me. He terrified me to the point that I just couldn't handle it. I just couldn't take it.

CHERYL WELCH: TR. VOL. V AT 93-94

Q. When did you decide to leave United Companies?

A. December of '92.

Q. Was it a voluntary decision?

A. Yes. Even though I — I felt forced.

Q. You felt forced, forced by whom?

A. Gerald.

Q. Would you explain to the jury and to the Court why you left the company?

A. Well, when you go in on a job that you like and you like the other people that you work with and to hear this day in and day out and nothing ever, no matter what you do seems to get done about it, then, you know, you can't go on. You can't

daily taking the pressure. It was as much as I could take.

Q. When you left in December of '92, had any of the other employees already left the office?

A. Pam — Pam.

Q. Pam McMillan had already left?

A. Yes.

Q. How far before you left did Ms. McMillan leave?

A. Probably two months.

Q. Did your decision to leave the branch office at Dalton have anything to do with anything other than Mr. Waldrop's behavior?

A. No.